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ABSTRACT

Law and policy regarding vocational education and training (VET) in Australia was systematically examined to explore these three hypotheses: (1) Australian law and policy on VET have not evolved in a systematic manner; (2) they also do not provide a coherent and internally consistent program for VET in Australia; and (3) they do not provide adequate guidance for people working in VET. Four conceptual criteria--transparency; completeness; coherence; and consistency--were used to explore the hypotheses. The link between the legislative framework of VET and labor market conditions was also examined. The study included an extensive literature review; preparation of an historical overview of VET law and policy; textual analysis of the law and policy regarding VET; and interviews with numerous VET practitioners and administrators. Special attention was paid to historical development of the regulatory framework of VET in Australia and VET policy in 1992-1998. The study established that law and policy regarding VET in Australia have indeed developed systematically, with the underlying theme of the development in the 20th century being the need to develop the national economy and provide an appropriately skilled labor force. Given the Australian constitutional context, the study found that federal, state, and territory policies and laws regarding VET probably work as completely, consistently, and coherently as the Australia federal structure allows. (Contains 234 references) (MN)

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# Law and policy in vocational education and training

## A contemporary survey

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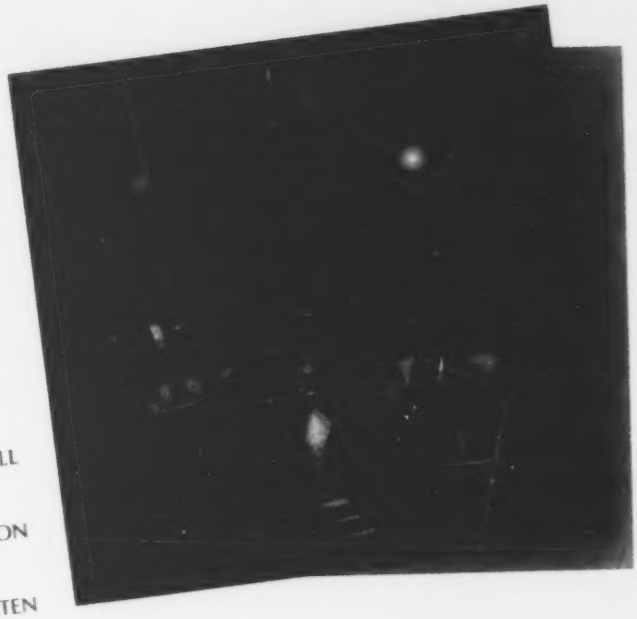

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# Law and policy in vocational education and training: A contemporary survey

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# Preface and acknowledgements

THIS RESEARCH PROJECT emanated from concerns arising in the field of labour law as a subject conceptualised and taught at tertiary level in Australian institutions of higher learning. Over the past few years Chris Arup of the School of Law and Legal Studies at La Trobe University, and Richard Mitchell of the Centre for Employment and Labour Relations Law at the University of Melbourne, have been engaged in work attempting to give a broader 'labour market' focus to the subject of labour law. The broad aims of this project, and many important issues incidentally arising from it, were discussed by the various contributors to R Mitchell (ed.) 1995, *Redefining labour law: New perspectives on the future of teaching and research*, occasional monograph no. 3, Centre for Employment and Labour Relations Law, University of Melbourne. Generally speaking, 'Redefining Labour Law' as a project, seeks to identify legal areas of importance to labour markets, but which have been marginalised or ignored in the composition of the labour law subject. One of the key areas of omission has been that of vocational education and training (VET) as a tool of labour market regulation. Neither labour law nor education law has given very much attention to the legal structure and incidents of VET, and this research project and report were designed to remedy that gap in knowledge.

It is important that we record here that this project was funded by a grant from the ANTA Research Advisory Council in 1996, and that it was conducted jointly by the Centre for Employment and Labour Relations Law at the University of Melbourne, and the University of Melbourne TAFE Collaboration Project (UMTC) (representing a memorandum of understanding between the University of Melbourne, Kangan Institute of TAFE and Box Hill Institute of TAFE). Dr Ann Shorten, formerly of the Faculty of Education at Monash University, and Mr Ian Robertson of Box Hill Institute of TAFE were appointed research fellows in the University of Melbourne Law School for the duration of the project. The grant was administered on behalf of ANTA by the National Centre for Vocational Education Research.

It is necessary to extend thanks to many people who assisted in this project. Sean Cooney gave invaluable advice on the conceptualisation and early development of the research project. At various stages we benefited from the advice and assistance of Chris Arup, Richard Curtain, Paula Darvas, Anthony O'Donnell, David Quinn and Rolf Sorensen. At a late stage in the report's preparation Flora Carapalluci, of the Department of Workplace Relations and Small Business in Canberra, provided us with valuable insights and information about the VET system. We owe thanks also to the members of the UMTC Board for supporting arrangements which allow collaborative higher education and TAFE research projects such as this to be undertaken, and to the Project Reference Group whose task it was to keep an eye on things on behalf of UMTC. In particular in this regard, we are grateful to Ray Grenfell of Box Hill Institute of TAFE, Marjorie Webster of Kangan-Batman Institute of TAFE and George McLean of the Office of Training and Further Education, Victoria and also to Janine Carruthers and Maddy Harford of the UMTC project for their commitment to ensuring the project's success. Thanks are also extended to 31 interviewees who gave us the benefit of their highly informed expertise, but who must remain anonymous. Finally, Mary Greco patiently, and with good humour, typed and corrected many drafts of the report. Her important contribution is gratefully acknowledged.

**Richard Mitchell**
**Ian Robertson**
**Ann Shorten**

# Introduction

## 1 The research objectives

THE CENTRAL OBJECTIVE of this study is to provide a systematic classification, examination and evaluation of the law relating to the provision of vocational education and training (VET) in Australia. This central objective was broken down into specific objectives, which were refined as the research progressed. The refinement process took into account the size of the research task and what we felt we could most usefully contribute to the study of the area of VET law and policy.

It was known prior to the commencement of the research that there was a large volume of law relevant to the provision of VET. In the light of the central objective of the research, and of the scope of the body of law relevant to VET, the following specific objectives were developed. The first specific objective was to classify the body of law. The second specific objective was to describe and examine the most important aspects of VET policy. The third specific objective was to investigate the link between the policy and the legislation. However, we also appreciated the extent of the jurisdictional complexity in the Australian federal system and the changing nature of policy relating to VET which arose from changes in different governments' responses to pressures arising from labour market conditions in Australia. Thus we decided to explore several hypotheses in examining the law and policy relating to VET. These hypotheses were:

- that the law and policy on VET have not evolved in a systematic manner
- that the law and policy on VET do not provide a rational, coherent or internally consistent program for VET in Australia
- that the law and policy on VET do not provide adequate guidance for people working in VET

To investigate these hypotheses we chose to examine the law and policy according to various conceptual criteria, which may be used in this context to throw light on the nature of legislation.[1] These conceptual criteria are:

- transparency—which requires that the question be asked whether or not legislation and policy in its current form is likely to be comprehensible and accessible to those required to implement it, and to the public in general as well as to researchers
- completeness—which requires that the question be asked whether or not there are any gaps and ambiguities in the legislative framework at federal and/or State and Territory level
- coherence—which requires that the question be asked whether or not the overall body of legislation gives effect to a coherent, rational strategy with respect to the fundamental objectives of governmental policy relating to VET
- consistency—which requires that the question be asked whether or not there is evidence in the overall body of legislation of duplication and imprecision in the administrative structures which are provided for the implementation of VET law and policy

Consequently, the fourth specific objective of the research was to evaluate the law according to these conceptual criteria. This evaluation was done by textual analysis of the law and the policy, and this process was assisted by insights gained by the researchers during the course of interviews with a number of experts, both practitioners and administrators, in the field of VET. Finally, the fifth objective was to examine the nature of the link between the legislative framework of VET and labour market conditions, an objective which arose from the origins and rationale for the research.

# 2 The rationale for the research

During the second half of the twentieth century there have been world-wide changes in the structure of labour markets, in the rapid growth of new technologies and in the decline of many industries which were providers of mass employment. Australia has not been immune from these changes.[2] Some general consequences of these developments are that there has been a substantial increase in the numbers of unemployed, increased mobility of labour between nations, a decrease in the availability of unskilled and semi-skilled jobs in many national economies and changes in conditions of employment, viz a rise in short-term employment, an increase in part-time employment and in casual employment. As international commentators have noted:

> *The rapidly rising demand for higher-level skills is manifested in continuing high or even increasingly skill-specific wage differentials, despite the strong growth in the supply of highly educated workers with post-secondary education credentials and university degrees. Moreover, the gradual shift of standardised mass production to lower-wage countries within an increasingly global market environment has already come to be felt in highly industrialised countries in the form of rising unemployment*

*rates of unskilled workers. This is particularly true for unskilled youngsters who—without special integration measures—face permanent exclusion from the labour market. Last, but not least, the rapid pace of technological change, structural shifts from immediate production to tertiary functions, shorter product cycles, and an increasingly volatile global economic environment have resulted in accelerated skills obsolescence and enhanced requirements of workers' mobility and ability to acquire new skills, and to repeatedly update, their skills in the course of their working lives.*[3]

National governments, and supra-national governments where these exist, for example in the European Community, have come under increasing pressure to facilitate the ability of workers to adapt more effectively to the changed labour market conditions. In particular, governments have been pressured to institute labour market programs which will enable workers to shift efficiently and effectively from declining sectors of industry to newly developing areas, to facilitate the upgrading of skills of early school leavers, to enhance the retraining of middle aged and older workers, to provide public education and training programs for short-term, part-time and casual workers who will be unable to secure the benefits of employer and industry training programs and to adapt migrant workers to the conditions of the host labour market. One consequence of the labour market changes over the past few decades has been that:

*All these developments seem to require a new institutional 'rapport' between the production of individual skills and competencies on the one hand and the production of goods and services in the economy on the other. In particular, the growing importance of post-secondary schooling and higher education in supplying the skills necessary not only for traditional professions, higher-level managerial staff and government officials, but increasingly also for mid-level production and service functions implies that new institutional links and co-ordination mechanisms between schools and businesses have to be developed in order to avoid skills mismatches and the devaluation of public education investments.*[4]

The same kinds of developments in labour market programs have occurred in Australia since the 1970s.[5]

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It seems axiomatic that the effectiveness of any nation's response to these kinds of labour market requirements will be affected by the particular nation's provision for education and training, and that a comprehensive, internally consistent and strategically appropriate legislative framework for national education and training would be likely to be more effective than one which is fragmented, lacking in consistency and in appropriate strategic direction. In Australia there are significant bodies of federal and State and Territory law which govern the organisation and delivery of education and training. The systematic classification, examination and evaluation of this law relating to VET, which is the central objective of this research, has not before been undertaken. It has only been during the 1970s, 1980s and 1990s that there have been any attempts by academic researchers and members of the legal profession to provide at least a systematic description and examination of the interaction between law and the provision of education generally.[6] Further, a review of Australian labour law texts

has revealed that, to date, the interface between the law and the provision of education and training has not attracted the close attention of labour law researchers. Consequently, this research should prove to be of value to legislators, policy-makers, training program administrators in the public and private sectors, VET practitioners, both in the public and private sectors, and academic researchers in that it will provide a complete and accessible discussion of the law relevant to the provision of VET. It will also lead to the development of a body of knowledge which may underpin components in courses for undergraduate students in labour law, and which may also be used in courses which deal with the interface of education and the law in postgraduate courses in educational administration.

# 3 Defining the parameters of the project

Before considering the methodology to be used in this research, there are a number of threshold issues, which define the parameters of the project, to be noted. The first issue is that it is necessary to indicate what is 'VET' for the purposes of this research. The second issue is that it is necessary to define what is 'law' for the purposes of this research. This leads to a third consideration, namely what is the scope of the law relating to VET to be included in the research, and the fourth issue is what is 'policy' in this research.

## 3.1 'VET' in this research

The *Australian Legal Dictionary* defines technical and further education as:

> *Education that provides either a preparatory course for, or is a course of instruction or training for, a trade or a technical or other skilled occupation, or that meets educational needs: for example (CWTH) Employment, Education and Training Act 1988 s 3(1). Technical and further education does not include instruction at a higher education institution, except where the Minister declares this instruction to be technical or further education, or education in a primary or secondary school: for example (CWTH) Employment, Education and Training Act 1988 s 3(1). Technical and further education includes basic and pre-vocational education and vocational education and training: for example (NSW) Technical and Further Education Commission Act 1990 s 3(1).*[4]

For the purposes of this research what constitutes VET within Australian education systems generally is identified by two key discriminators: its *key purpose* and its *location within the general organisational structure* for the provision of education. The key objective of VET is to provide training in skills and competencies for employment. VET may be provided by industry and commerce in 'on-the-job' training and by educational institutions. In general, as far as its provision by educational institutions is concerned, it is provided by both public and private post-compulsory and/or post-secondary education institutions, other than institutions of higher education. These institutions are those which provide adult and community and further education (ACFE), those which provide

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technical and further education (TAFE), as well as private providers, correctional services and military services. In the words of one expert in the field, it is, in practice, that vocational education which is concerned:

> *. . . with the vocational education and training of the majority of the work force, with the ways in which knowledge and skill are developed and for the majority of occupations, not with vocational education for the professions or for those occupations requiring a higher education qualification for entry.*[9]

There are, however, some exceptions in the structural institutional provision for VET.[10] Some higher education institutions are multi-sectoral and provide TAFE as well as higher education. Moreover there are secondary school VET programs which are linked to and articulated with TAFE programs.

Where definitions in State and Territory legislative instruments of 'technical and further education' and/or of 'vocational education and training' exist, they further illustrate the complexity of defining what does or does not constitute TAFE and VET.[11] Generally speaking, these definitions use an exclusionary, limiting approach which is consonant with the discriminators noted above. They rely upon the criteria of the purpose of the education and training and of the location of the provision of the education to define the parameters of what constitutes technical and further education and vocational education and training. However, this exclusionary approach is ameliorated in some jurisdictions by provisions which empower the relevant Minister to declare courses of training to be vocational training irrespective of which institution offers them. The point may also be made that some legislation provides separate definitions of 'technical and further education' and 'vocational education and training' whilst in other jurisdictions the legislation clearly subsumes the definition of the latter in the definition of the former.

## 3.2 'Law' in this research

The subject matter of this research is VET: Law and policy. What is 'law' for the purposes of this research? The *Concise Oxford Dictionary* includes in its definitions of 'law' the following: '"law" *(n)* 1. Body of enacted or customary rules recognized by a community as binding'.[12] What are the enacted rules related to VET which are recognized as binding in Australia? A major primary source of these rules is that body of statute law, that is Acts of Parliament, and subordinate or delegated legislation, that is regulations and statutory rules, passed by the Australian Commonwealth and State and Territory Parliaments which determine how the provision of VET is organised, funded and delivered, and define the rights of, and the relationship between, the providers and clients in VET. Whether Ministerial or executive orders and declarations issued through the exercise of executive powers and discretions are strictly speaking legislation or not, is a moot point, but not one of great significance because they have the same practical effect as legislation.[13] Administrative guidelines issued by government, in the exercise of powers given by legislation, are also relevant. These guidelines assist

in determining how the legislation is implemented. There is also promotional and advertising material which is designed to provide information for the end-user of legislation, which has been characterised as 'leaflet law' in the United Kingdom,[14] which has not been investigated in this research. Where legislation falls to be interpreted by courts or tribunals, the resulting case law is also a primary source of law in relation to aspects of the provision of VET. Hence what is 'law' for the purposes of this research is comprised of legislation, including subordinate legislation, Ministerial or executive orders or declarations, administrative guidelines, and insofar as it has developed in relation to this legislation, the case law which interprets the legislation.[15] It may be noted that case law is more likely to arise where legislation confers rights or imposes obligations on persons or bodies, government and otherwise. Legislation which is in many respects primarily concerned with the development of administrative structures for the development and implementation of policy, which is true of much legislation relating to education generally, as well as that relating to VET in particular, is less likely to give rise to a body of case law over time. Where legislative developments are fairly recent, there is even less likelihood that a body of case law will have developed.[16]

## 3.3 Scope of the law relating to VET

Another aspect of the definition of the parameters of this research project in relation to the law to be reviewed is the identification of the scope of this law. One starting point for considering this question is simply to undertake the taxonomic exercise of describing the range of law which affects the funding, organisation and delivery of VET. The taxonomic perspective reveals a broad picture, but two general categories of law may be identified. On the one hand there is the federal, State and Territory law directly relating to the funding and organisation of VET. On the other hand there are those laws of general application which also affect the provision of educational services, including the provision of VET. Further selection of the law in these two general categories was refined by focussing on those laws which were most closely relevant to key contemporary policy developments in VET.

It was not difficult to decide that the law relating to the funding and organisation of VET was the fundamental core focus of this research, given the current policy emphases upon the development of a national training policy and the introduction of the New Apprenticeship System.[17] For example, the educational policy and funding legislation passed by the Commonwealth is clearly of great significance to the provision of VET. The State and Territory legislation relating to post-compulsory education is also important. This federal and State and Territory law essentially deals with the relationships between the governments, the providers of VET, the industrial and commercial stakeholders in the provision of VET, the systemic organisational structure of VET in the States and Territories, and the powers and activities of individual institutions which

provide VET. These laws constitute the legislative framework within which the National Training Policy is being developed and implemented. Similarly, as far as the introduction of the New Apprenticeship System is concerned, the regulation of apprentices and trainees is also part of this State and Territory law, but industrial law, both of the Commonwealth and of the States and Territories, also plays a significant role in the regulation of on-the-job training. It is these laws which constitute the relevant regulatory framework for the implementation of current policies in VET which are examined in detail in this research.[18]

Certain laws of general application are also relevant to current policy developments in the provision of VET, particularly the application of competition policy and the implementation of policies relating to access and equity.[19] The application of competition policy in the Australian training market will necessarily impact upon the activities of VET providers. Consequently, competition policy law is briefly described. The implementation of policies relating to access and equity also calls into play other laws of general application. For example, Commonwealth legislation which provides benefits to students, within the context of social security legislation, and to Aboriginal and Torres Strait Islander students, and to other disadvantaged groups such as migrants, may be considered relevant because it covers students in VET as well as students in other education sectors. Similarly federal and State and Territory anti-discrimination laws have a significant role to play in the implementation of the principles of access and equity.[20] These laws relating to competition policy and to the policy relating to access and equity are examined only briefly because their relevance to the provision of education and training is not limited to VET,[21] and it would have been impractical to attempt to examine in detail the law and related policy in these fields within the constraints of a single research project of finite temporal duration.

However, it must be emphasized that the legislation noted above does not constitute the full range of law relevant to the provision of VET. There are other laws of general application which affect the provision of educational services, including the provision of VET. For example, international law, which has become part of Australian municipal law, affects the provision of VET. The Commonwealth *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, and the *Disability Discrimination Act 1992*, all of which incorporate international conventions may be cited. Further much Australian municipal law has to be taken into account in the provision of VET by public sector institutions. Administrative law, that is the law relating to judicial review of administrative decisions, will be relevant where the providers of VET fall within the scope of that legislation. Similarly, Ombudsman legislation and Freedom of Information legislation will also be relevant to the activities of VET providers who fall within the scope of these Acts. In those jurisdictions where it exists, privacy law which applies to government instrumentalities or authorities funded by government will also be relevant to VET providers. Further State and Territory audit

legislation will be relevant to the operation of government sector TAFE institutions. Fair trading law of the States and Territories will be relevant to the practices of providers of VET, who will also be required to observe the laws regulating the provision of education for overseas fee-paying students.

Further the operations of VET providers require the observance of other laws. If a provider of VET is an organisation which administers charitable trusts, the law relating to trusts will be relevant to these activities. Company law may also be relevant to the activities of VET providers, and there will also be a range of other laws, for example, liquor licensing laws, health legislation controlling the establishment of veterinary surgeries and road traffic laws which will impose legal duties and liabilities upon providers of VET. The employment of staff will involve, depending upon the circumstances in a particular jurisdiction, contract law, employment law, industrial relations law, public sector management legislation, occupational health and safety law and workers' compensation law, which regulate the legal relationship between the VET providers as employers and their employees. Some laws, such as those relating to occupational licensing and occupational health and safety laws, may influence the scope and nature of the VET providers' curricula in certain fields of training and hence also are relevant to the provision of VET. Finally, it may also be noted that the law relating to defamation and to the tort of negligence are also relevant to the activities of VET providers, as they are to the activities of other education sectors. That the relevance of these laws to VET is noted rather than examined in detail is not a reflection of their importance to administrators and stakeholders in the provision of VET. Rather it is reflection of the limits of a single research project such as this one.

## 3.4 'Policy' in this research

What is 'policy'? The *Concise Oxford Dictionary* defines 'policy' in the following terms: 'policy *(n)* Political sagacity; statecraft; prudent conduct, sagacity; craftiness; course of action adopted by government, party, etc'.[22] For the purposes of this research the relevant element of this definition is that policy is a 'course of action adopted by government', and in relation to VET it is the action taken by governments in the exercise of legislative and executive powers in relation to the provision of VET in the several Australian jurisdictions as part of general economic and social policy.

In this research the development of contemporary policy in relation to VET is described at some length, with particular emphasis upon the development of the National Training Policy, and the New Apprenticeship System.[23] However other aspects of contemporary policy are also canvassed—issues such as the National Training Framework, third party access and user choice in the National Training Market, and policies related to access and equity.[24]

# 4 Methodology

In legal research, as in all research, the choice of analytical tools is of key importance. What kinds of tools are available to a legal researcher? One critique of methodological issues relating to research in labour law has identified several modes of analysis: the traditional legal framework for legal analysis, imported theoretical approaches, including 'critical legal studies, feminist theory, the English economic regulationists, sociology of law and regulatory theory', multi-disciplinary analysis and inter-disciplinary analysis.[25] The criticisms of traditional legal analysis, viz its textual focus, the narrow range of questions used, and the essentially historical and descriptive approach of doctrinal analysis of case law, suggest the inadequacies of this approach.[26] The use of paradigms drawn from imported theoretical approaches will not necessarily provide a useful alternative methodology.[27] Equally, both multi-disciplinary and inter-disciplinary analysis, although helpful in extending the range of methodological tools available to legal researchers, may still in some respects be problematic.[28]

The objectives of this study and the hypotheses which were to be explored provided some guidance as to the selection of appropriate analytical tools. In the light of the key objective of the research, namely that of providing systematic classification, examination and evaluation of the law relating to the provision of VET in Australia, traditional textual analysis commended itself as the most useful methodology. This required the identification of the law relating to VET through an examination of the primary sources, namely the authoritative texts, that is the legislation and subordinate legislation, and the secondary sources, that is indexes and digests such as the *Australian Legal Monthly Digest* and *Australian Current Law*. Cumulative legislative indexes were also consulted as were the annotations of statutes, which are available for some jurisdictions and which provide a guide to the development of case law relating to the legislation. However, this process was not without its difficulties. The legislative process is a dynamic one and there was legislation and subordinate legislation from nine jurisdictions to be identified. The body of core legislation relating to VET was not static but was constantly developing. As this research project was a finite operation it was necessary to decide upon a currency date, and, to enable the finalisation of the research report, 1 March, 1998 was chosen as the cut-off date. This meant that some foreshadowed legislative changes could not be included because an Act of an Australian Parliament does not become law until it comes into force and is proclaimed.

For both the law and policy relating to VET a literature survey was compiled.[29] The survey demonstrates that there has been very little systematic research and analysis of the legal framework and incidents of vocational education and training in Australia. The approach taken to the survey is described, as are the methodological issues which arose, the sources used, the search terms, the selection of material for inclusion and the terminology used.

The survey covers research in vocational education and training generally, the research on the legislative and regulatory framework, which included legal and industrial relations commentary and general commentary on the regulatory and policy framework, and research on policy making in vocational education and training. Material dealing with the link between industrial relations and vocational education and training is also noted. Major emergent policy themes in the literature are noted: the movement towards a national vocational education and training system; the tension between national, State and local interests; the need to develop an industry led system which meets the needs of individuals and groups under-represented in the vocational education and training system; the need to develop a national system which equips Australians for work, enhances mobility in the labour market and overcomes skill development and recognition problems; and a national system which provides maximum value for public expenditure and increases investment in training by industry. This survey contributed to the achievement of the second specific objective of the research, namely the description and examination of the most important aspects of VET policy.

The achievement of the third specific objective of the research, namely to investigate the link between the policy and the legislation, required the exploration of the hypothesis that the law and policy on VET have not evolved in a systematic manner. The preparation of a brief historical overview of the development of VET law and policy seemed to be a useful exercise. However, there were difficulties. It was not possible within the scope of this research project either to extensively research the plethora of relevant primary source materials, the examination of which would be mandatory in an historical study, or to describe and defend the historiographical theories which would underlie the conclusions reached. Consequently, the practical solution was to rely upon the work of practising historians, that is to rely upon secondary sources rather than primary sources. The second difficulty was how to present the historical overview for the purposes of this research, that is within the terms of the hypothesis being explored. It was decided to provide a brief introductory note on the development of the legal basis of technical education and of apprenticeships in the Australian colonies during the nineteenth century, and to describe in a little more detail the further development of the legal basis of technical education and apprenticeships in the Australian States during the first half of the twentieth century. The increasing involvement of the Commonwealth in education, including technical education, after 1945 is then described. The historical overview then focusses in more detail on the period from the 1970s to the early 1990s. The development of labour market programs, the development of the concept of traineeships, the subsequent development of the National Training Reform Agenda, the development of a national legal framework for VET from 1970s to the 1990s, and the developments in State and Territory legislation and in federal legislation culminating with the establishment of the Australian National Training Authority in 1992, are covered in some detail. Certain emerging themes

which assist in developing a response to the hypothesis are noted in the conclusion.[30]

The third specific objective was to investigate the link between the contemporary policy initiatives and the legal frameworks for VET in the federal and State and Territory jurisdictions. This was done by identifying the legislative framework relevant to key contemporary policies relating to VET and organising key sections of the descriptive survey of the legal regulation of VET according to these key contemporary policies, namely the statutory framework for the National Training Policy, the regulation of apprentices and trainees in the light of the New Apprenticeship System, the application of competition policy to VET through competition legislation, and legislation supporting the policy of access and equity.[31] This structure facilitated the exploration of the second and third hypotheses, namely that the law and policy on VET do not provide a rational, coherent or internally consistent program for VET in Australia, and that the law and policy on VET do not provide adequate guidance for people working in VET. This in turn was essential to the achievement of the fourth specific objective, namely to evaluate the body of law and the key contemporary policies according to four conceptual criteria of transparency, completeness, coherence and consistency. This evaluation was done by textual analysis of the law and the policy, which was to be assisted by insights gained by the researchers during the course of interviews with a number of experts, both practitioners and administrators, in the field of VET.[32]

The exploration of the third of the hypotheses, namely that the law and policy relating to VET do not provide adequate guidance for people working in VET, clearly required the use of a different methodological tool. If the insights of at least some experienced people within the VET sector as to the efficacy of VET law and policy are to be gained, then some kind of interview or survey was required. Of the many tools available in empirical social research, qualitative interviewing was adjudged the most appropriate for this research. It is acknowledged that there are strengths and limitations in any empirical research methodology, and the use of qualitative interviews is no exception. However, given that the purpose for undertaking qualitative interviews in this research was to test the researchers' findings from the textual analysis of the law and policy relating to VET and that consequently the interview materials were not to form the core of the research, issues such as sample selection, sample size and data analysis did not have to be addressed in the same way that they would have needed to be dealt with if a survey of opinion was being undertaken. Given the purpose of the qualitative interviewing and the resources available for the project, it was decided that a sample of about thirty interviewees would be sufficient, and assistance was sought from experienced administrators and practitioners in the VET sector, including both public and private providers, in a number of jurisdictions. The development of an interview schedule did need to be addressed and it was decided to use open-ended interview questions which related to the criteria of

transparency, completeness, coherence and consistency. Although it is true that the use of open-ended questions can result in the gathering of irrelevant data, this was considered to be a lesser limitation than the use of closed questions which could fail to elicit an appropriate range of data. The approval to undertake these interviews was granted by the University of Melbourne Human Research Ethics Committee and the use of the material in the research report was to be governed by the ethical requirements of that committee relating to the giving of informed consent by interviewees, and total confidentiality and complete anonymity for participants in relation to the responses given. The generosity of the very experienced interviewees in giving their time to participate in the research provided valuable clarification of issues and enriching insights for the researchers, and for the project as a whole.

The fifth and final specific objective was to examine the nature of the link between the legislative framework of VET and labour market conditions, an objective which arose from the origins and rationale of the research. The labour market in any economy, that is the nature of the demand for and the supply of labour within the economy, is influenced by a bundle of factors: economic factors, which may be national or international, financial, technological, commercial and industrial; social factors; and political factors. The interaction between these factors determines the availability of employment and the nature and the terms and conditions of employment. It is not within the scope of this research to explore the operation of these factors in detail. However, it may be noted that the field of labour law has traditionally during the twentieth century been concerned to examine the law which regulated employment relationships in the labour market. Not surprisingly, in Australia the traditional approach to labour law has focussed on the employment relationship and upon the regulation of that relationship by the State directly, or by trade unions and employers, that is, by State and collective institutions. It has been concerned with the fact of employment. Commentators in the contemporary debate on the parameters of labour law have noted how economic and social change have led to changes in employment law and industrial relations law, and have highlighted the developing interfaces with other areas of law, which, it is argued, have become properly the concern of labour lawyers, including the law relating to vocational education and training and to social security.[33] The law relating to VET is not so much concerned with the incidents of employment, and with the terms and conditions of employment contracts, but rather with individual persons in the labour market. Nevertheless it is legitimate for labour lawyers to consider the link between the legislative framework of VET, and labour market conditions, as an important part of their field of study.[34]

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# 5 Conclusion

In this introduction the central research objective and the five specific objectives which were refined during the course of the research have been described, and

the three exploratory hypotheses which were used in the achievement of these objectives are noted. The fundamental rationale for the research has been explained. How the parameters of the research task were developed has been described, with particular reference to:

- the definition of 'VET' used in the research
- what was meant by 'law' for the purposes of this research
- the scope of the law relating to VET as far as this research was concerned
- what was meant by 'policy' in this research
- the methodology used in the research

Two points are worthy of further emphasis. The first relates to the scope of the law relating to VET for the purposes of this research. The major focus of the report is on the core legislation regulating the provision of VET and the regulation of apprenticeships and traineeships. This legislation provides the federal and State and Territory legislative frameworks for the development of the National Training Policy and for the implementation of the New Apprenticeship System. However, this legislation also has other functions relating to the regulation of VET providers, the establishment of statutory bodies relevant to the administration of VET policies, and, in some jurisdictions, the regulation of vocational placements. Some legislation which underpins the application of competition policy and of policies relating to access and equity in VET are more briefly described. Other legislation which affects the provision of VET has only been briefly noted within the context of this research report, but its significance and importance to the operation of the VET sector should not be underestimated. The second point is that the main methodological tool used in this research is traditional legal research methodology, which is supported by quasi-empirical methodology to enhance the interpretation of the core data.

The report includes an historical overview of the development of the legal basis for the provision of VET, a literature survey which notes available commentary in the field of VET law and policy, a survey of contemporary policy for VET, a survey of the legal regulation of VET, an examination of VET law and policy in the context of the objectives of the research, and finally a concluding comment. A reference section of sources consulted is also provided.



# Endnotes

1 See, for example, Cooney, S 1995, *The transformation of Migration Law*, Bureau of Immigration, Multicultural and Population Research, AGPS, Canberra.

2 See, for example, for a detailed account of economic and other policy changes in Australia, Kelly, P 1992, *The end of certainty: The story of the 1980s*, Allen and Unwin, Sydney, *passim*, and Gruen, F & Grattan, M 1993, *Managing government: Labor's achievement and failures*, Longman Cheshire, Melbourne, especially chs 6–9, pp.91–178; for an account of the changes in the United Kingdom, see Davies, P & Freedland, M 1993, *Labour legislation and public policy: A contemporary history*, Clarendon Press,

Oxford, especially chs 6–10, pp.238–639, (hereinafter referred to as Davies and Freedland, 1993).

3 Buechtemann, C F & Soloff, D J 1994, 'Education, training and the economy: Report on an international conference on human capital investments and economic performance', *Industrial Relations Journal*, vol 25, no.3, pp.236–237.

4 *Ibid.*, p.237.

5 For comprehensive listings of Australian labour market programs since the early 1970s, see the *Report of the Committee of Inquiry into labour market programs*, AGPS, Canberra, 1985, the Kirby Report, pp.69–74 and *Australia reconstructed: ACTU/TDC Mission to Europe: A report by the Mission Members to the ACTU and the TDC*, AGPS, Canberra, 1987, Appendix 4.1, Catalogue of Labour Market Programs and Initiatives, pp.129–134, (hereinafter referred to as *Australia reconstructed*, 1987).

6 See Chapter Three, Literature survey, pp.58–59.

7 See Chapter Three, Literature survey, pp.59–60.

8 Australian Legal Dictionary 1997, Butterworths, Sydney, p.1152. See Chapter Two, Historical overview, pp.41–42 for an account of the introduction and scope of the (Cwth) *Employment, Education and Training Act 1988*, and Chapter Five, A survey of the legal regulation of vocational education and training, p.133, for an account of the current status of this Act.

9 Sweet, R 1995, 'Thinking about learning and work: Academia and vocational education', *The Australian Universities' Review*, vol.38, no.1, p.54.

10 See Chapter Five, A survey of the legal regulation of vocational education and training, pp.154–156, for an account of the provision of TAFE by higher education institutions.

11 The scope of the definitions varies from jurisdiction to jurisdiction. For example, the (ACT) *Canberra Institute of Technology Act 1987* s 3(1) defines 'technical and further education' as 'education provided by way of a course of instruction or training that is, or that is preparatory to, a course of a kind relevant to a trade, technical or other skilled occupation or that otherwise meets the educational needs of individuals and includes para-professional and professional training'. However the (ACT) *Vocational Education and Training Act 1995* does not provide a definition of either TAFE or VET.

The (NT) *Northern Territory Employment and Training Authority Act 1991* similarly does not provide a definition of either TAFE or VET. Neither the (NSW) *Industrial and Commercial Training Act 1989* nor the (NSW) *Board of Vocational Education and Training Act 1994* provides a definition of either TAFE or VET, but the (NSW) *Technical and Further Education Commission Act 1990* s 3(1) states that 'technical and further education' includes '(a) basic and pre-vocational education; and (b) vocational education and training,' and the (NSW) *Vocational Education and Training Accreditation Act 1990* s 4(1) defines a 'vocational course' as 'a course or proposed course of vocational education or vocational training, but does not include: (a) a course of studies (being a course of studies that leads to a degree) conducted by an official university or other corporation, body or institution authorised under the *Higher Education Act 1988* to confer degrees; or (b) an advanced education course (being a course of studies that leads to a degree) approved under that Act'.

1.1

The (Qld) *Vocational Education, Training and Employment Act 1991* s 4 defines 'technical and further education' as 'tertiary education other than advanced education or university education' and 'vocational education' as 'education having a vocational outcome and encompassing technical and further education including courses run by State colleges'. However the draft Vocational Education and Training Bill 1997 s 5 and Sch 4 does not provide definitions of these terms.

The (SA) *Vocational Education, Employment and Training Act 1994* does not provide a definition of either TAFE or VET, but the (SA) *Technical and Further Education Act 1975* s 4(1) provides that 'technical and further education' 'means instruction or training in any academic, vocational or practical discipline other than instruction or training excluded from the application of this Act', and s 5 provides that the excluded instruction or training is instruction or training provided in any government school under the *Education Act 1972*, instruction or training provided in any primary or secondary school at which the majority of students are enrolled on a full-time basis, university instruction or training, pre-school instruction or training, and instruction or training provided by any theological college, seminary or religious body.

(Tas) *Vocational Education and Training Act 1994* s 3 defines 'vocational education and training' as 'post-compulsory education and training, excluding secondary education or University education, as specified in section 4', and s 4(1) provides that 'vocational education and training' 'is to be (a) directed to the development of vocational competencies; and (b) in preparation for, or directed to, the enhancement of opportunities to undertake vocational education and training; and (c) structured to incorporate principles of equal opportunity and fairness'. Section 4(2) details what is to be included in vocational education and training: '(a) training courses provided by the State; and (b) accredited courses provided by private training providers; and (c) accredited courses provided by employers in the workplace; and (d) accredited training courses required under a training agreement and provided by training providers in another State or in a Territory of the Commonwealth; and (e) adult and community education; and (f) literacy, language and numeracy; and (g) basic education in the workplace.' A similar legislative structure has been used in the (Tas) *TAFE Tasmania Act 1997*, but the definition of 'vocational and further education' in s 4 of this Act provides a contemporary redefinition of this term: '4(1) Vocational and further education is to be directed to—(a) the preparation for the development of occupational competencies; and (b) the development of occupational competencies; and (c) the development of cognitive, social artistic and physical competencies; 4(2) Vocational and further education includes—(a) provision of education and training; and (b) development of education and training materials; and (c) assessment of competencies; and (d) adult and community education; and (e) adult literacy, language and numeracy education; and (f) adult basic education'.

The (Vic) *Vocational Education and Training Act 1990* provided in s 3 that 'technical and further education' has the same meaning as in the Tertiary Education Act 1993 and that 'vocational education and training' means '(a) that part of technical and further education which is directed to the development of skills in relation to a trade or vocation; and (b) apprenticeships and other forms of training which are based in the workplace'. The (Vic) *Tertiary Education Act 1993* s 3 defines 'technical and further education' as 'post-secondary education wherever provided or offered which is not directed towards—(a) the award of a degree or diploma at an autonomous college or university; or (b) a higher education award within the meaning of section 9', which deals with definitions relating to higher education. This Act also provides a definition of 'further education' which distinguishes between technical and further education which is not vocational and that which is vocational, and a definition of 'post-secondary education' which means 'the education of persons—(a) who are beyond the age of compulsory school attendance; and (b) who are not undergoing a course of secondary education'.

The (WA) *Vocational Education and Training Act 1996* s 5(1) defines 'vocational education and training' as 'post-compulsory education, instruction, training or experience that encompasses the development of skills, knowledge and attitudes in any vocation, or in any academic or practical discipline relevant to a particular

occupation, business, employment or trade, but, subject to section 6, does not include education, instruction, training or experience provided by a secondary school or a university'. Section 6, however, provides that the Minister may approve, for the purposes of this Act, specified courses in specified secondary schools or universities, as courses which fall within the definition of 'vocational education and training' in s 5(1).

12 The Concise Oxford Dictionary 1970, 5th edn, Clarendon Press, Oxford, p.684.

13 Pearce, D C & Geddes, R S 1988, *Statutory interpretation in Australia*, 3rd edn, Butterworths, Sydney, p.2.

14 For a discussion of the application of the concept of 'leaflet law' in the United Kingdom, see Davies, P & Freedland, M 1984, *Labour law: Text and materials*, Weidenfeld and Nicolson, London, p.29; and Freedland, M 1980, 'Leaflet law: The temporary short-time Working Compensation Scheme', 9 *Industrial Law Journal*, pp.254–258.

15 It may be briefly noted that what may be characterised as 'customary law' in the context of the provision of education, including VET, that is those internal informal rules or customs which are relevant to the behavioural expectations placed on the educational providers and their clients within educational institutions, has not been included in the concept of 'law' for this research. For a discussion of the concept of customary law in education, see Birch, I K F 1977, 'Law in Australian education', in Murray-Smith, S (ed.), *Melbourne Studies in Education 1977*, Melbourne University Press, Melbourne, pp.102–104.

16 For a general survey of the historical development of litigation in Australian education, see Shorten, A R 1996, 'The legal context of Australian education: An historical exploration', *Australia and New Zealand Journal of Law & Education*, vol.1, no.1, pp.2–32, *passim*, (hereinafter referred to as Shorten, 1996).

17 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.117-123.

18 See Chapter Five, A survey of the legal regulation of vocational education and training, pp.164–167.

19 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.115–116.

20 It may be noted that in recent decades anti-discrimination law has developed the greatest volume of case law in any field of law relating to education. See Shorten, 1996, pp.24–25.

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21 See Chapter Five, A survey of the legal regulation of vocational education and training, pp.184–189.

22 The Concise Oxford Dictionary 1970, 5th edn, Clarendon Press, Oxford, p.940.

23 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, *passim*.

24 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, *passim*.

25 Bennett, L 1995, 'Rethinking labour law: Methodological issues', in Mitchell, R, (ed.), *Redefining labour law: New perspectives on the future of teaching and research*, Centre for Employment and Labour Relations Law, Melbourne, p.140.

26 *Ibid.*, p.138.

27 *Ibid.*, pp.14–143.

28 *Ibid.*, pp.143–148.

29 See Chapter Three, Literature survey, pp.63–64 for a detailed statement as to sources used.

30 See Chapter Two, Historical overview, pp.46–50.

31 See Chapter Five, A survey of the legal regulation of vocational education and training, *passim*.

32 See Chapter Six, Vocational education and training law and policy: An examination, *passim*.

33 For a survey of the issues in this debate see, for example: Davies & Freedland 1984, Mitchell, R (ed.) 1995, *Redefining labour law: New perspectives on the future of teaching and research*, Centre for Employment and Labour Relations Law, Melbourne.

34 See Chapter Six, Vocational education and training law and policy: An examination, pp.240–243.



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CHAPTER TWO

# Historical overview: The development of the regulatory framework of VET in Australia

*We have reached that stage in our national life where the old must give place to the new . . . All the facts show that the time has come for a change . . . I see . . . that the great battle of the future between the nations will be for the supremacy of trade, and if the people of Great Britain and Australia are not equipped with the best technical and other education, they must inevitably go down in the struggle.*

(Hon. Thomas Price, MP, Premier and Minister of Public Works and Education, South Australia, 1905)[*]

*As the Government noted in* Skills for Australia *(1987), the 'main sources of productivity growth are technological change, increased capital intensity, improvements in labour efficiency, and economies of scale' (p.4). Education and training will play a vital role in productivity improvement by promoting labour efficiency through the enhancement of workforce skills.*

*The pursuit of more dynamic skills formation will allow Australian manufacturing and service industries to compete on the grounds of quality and reliability, which provide the leading industrial economies with much of their advantage on world markets. A co-operative approach to skills formation will give employees a vested interest in producing high quality goods and services.*

(Hon. Ralph Willis, MP, Federal Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters, 1988)[**]

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## 1 Introduction

After 1850, there was a considerable increase in the population of the Australian colonies as a result of the migration to the colonial goldfields. There was increased wealth and prosperity, and consequently diversified economic expansion. Industrial and commercial activities developed in the major colonial towns and cities. Farming and agriculture grew with the implementation of closer settlement policies. Mining of coal, gold and other minerals also expanded. Intracolonial transport by rail and intercolonial sea transport grew as the settlement of the colonies continued. However, both the pace and extent of

population growth and of the development of primary and secondary industry varied from colony to colony, and this affected the demand for education in the several colonies.

Initially English apprenticeship legislation, the *Apprentices Act 1828* and the *Apprentices Act 1844* applied in the Australian colonies, and this was subsequently supplemented by apprenticeship legislation, such as the apprenticeship provisions of the *Merchant Seamen Act 1849*, passed by the developing colonial legislatures. Apprenticeship legislation was passed by the New South Wales legislature, which applied also in Victoria, Queensland and Tasmania.[1] During the second half of the nineteenth century there were, generally speaking, three categories of legislation: that which governed the terms and conditions of indentures of apprenticeship in land-based crafts and trades, that which provided for the apprenticing of neglected and orphan children from industrial schools and reformatories, and legislation governing apprenticeship to the sea service. For example, in Tasmania the *Master and Servant Act* was passed in 1856, in Queensland, the *Masters and Servants Act* was passed in 1861, and in Victoria the *Master and Apprentice Statute* was passed in 1864, and these statutes were typical of the legislation which governed most apprenticeships, except those of neglected and orphan children, of which the Victorian *Neglected Children and Criminal Act 1876* was typical. This distinction remained when, towards the turn of the century, consolidating legislation was passed in several colonies. For example, the Victorian *Master and Apprentice Act 1890* and the New South Wales *Master and Apprentice Act 1894* and its replacement, the *Apprentices Act 1901*, did not apply to any child apprenticed under the provisions of the *Reformatory and Industrial Schools Act 1901*. As far as apprenticeship to the sea service was concerned the relevant legislation continued to be the legislation governing colonial navigation. For example, the Tasmanian *Merchant Seamen Act 1859*, the New South Wales *Merchant Seamen's Laws Consolidating Act 1864* and the South Australian *Marine Board and Navigation Act 1881* included the traditional provisions relating to apprenticeship to the sea service.

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Government intervention in matters relating to industrial training, by the promulgation of standards of vocational competency, usually occurred in occupations where public health and safety were concerned, for example, seafaring and mining.[2] The arrival of new technology, such as the telegraph, resulted in a demand for telegraphists, and for the provision of training for them.[3] As colonial administration developed, the testing of the efficiency of government employees by examination developed in a number of fields, including the licensing of land surveyors and of mining surveyors.[4]

As far as the public provision of education was concerned, the second half of the nineteenth century saw the development in the Australian colonies, during the 1860s of common school systems, and during the period from the 1870s to the 1890s, the introduction of legislation providing for free, compulsory and secular education.[5] Further, the foundations were laid for the development of higher

education, with universities established in Sydney, Melbourne, Adelaide and Hobart by 1890. The decades after 1870 also saw the establishment of the first major technical colleges. In New South Wales there was planning from 1865 for the introduction of technical classes at the Sydney Institute, and in Victoria from the 1860s, a Technological Commission, which was abolished in 1890, was set up to plan for technical education.[6] During the 1870s Schools of Mines were established in Ballarat and Bendigo in Victoria, and the Sydney Working Men's College was founded in conjunction with the School of Arts in 1878, and became independent when a Board of Technical Education was established in 1883.[7] The Melbourne Working Men's College was set up in 1886. Similar developments occurred in other colonies.[8] For example, the Coolgardie School of Mines was established in 1892, and that at Kalgoorlie in 1895.[9] Not surprisingly, in several colonies there were moves to establish agricultural colleges also.[10] As far as adult education was concerned, the mechanics institutes continued to spread throughout the colonies during the second half of the nineteenth century.[11] Finally, it must the noted that as the nineteenth century passed there was, however, no real concern for the effective provision of education for the indigenous people, either in adult education or in vocational instruction. The kinds of developments which occurred in the provision of indigenous education were influenced by the policies adopted in the several colonies in regard to the indigenous people. Victoria and South Australia did adopt policies of assimilating part-aboriginal persons, but in other colonies protectionist and segregationist policies prevailed.[12]

# 2 Technical education 1900–1945

## 2.1 The legal basis of technical education

At the federation of the Australian colonies in 1901 education was a power which remained with the States under the new federal constitution. By the turn of the century there was express dissatisfaction with the state of public education generally in the Australian colonies. This dissatisfaction included concern about the state of technical education. The link between effective education systems and national economic prosperity in the industrial age was seen to be of growing importance. For example, in New South Wales and Victoria there were wide-ranging inquiries into the state of education. The Royal Commission on Technical Education, chaired by the Hon. Theodore Fink, MP, was set up in Victoria in 1899 and sat from 1899 to 1901. Its report was published in 1905.[13] The *Report of the Commissioners on agricultural, commercial, industrial and other forms of technical education* (the Knibbs-Turner report) was published by the New South Wales Department of Public Instruction in 1905.[14] The mandate of the Fink Commission in Victoria was to investigate mining, agricultural and manufacturing training and technical education, and the problems of the articulation of technical instruction.[15] That of the Knibbs-Turner Commission was concerned with the articulation of technical instruction, with the fact that many certificates issued at

the time were considered to be of little value, with questions of poor equipment and the general chaos and confusion of the state of technical education in New South Wales.[16] The reports of these commissions included much evidence relating to developments in technical education in Great Britain and Europe.

Concern with the provision of public education, including technical education, was also evident in other States at this time. As early as 1891 a Select Committee of the Western Australian Legislative Council had addressed the issue of technical education in that colony, and concern for the provision of technical and scientific classes continued throughout the following decade.[17] In Queensland, by 1902, a Board of Technical Education was established in an attempt to improve the organisation of the technical colleges which had been administered independently by councils. However, its work did not prove successful, and in 1907 three colleges were amalgamated to form the Brisbane Technical College under the control of the Department of Public Instruction.[18] In 1904 there was an inquiry into the state of primary education in Tasmania,[19] and a South Australian Royal Commission on Education reported in 1912.[20]

During the second decade of the century, Australian industrial endeavour was stimulated by the economic requirements of the war effort from 1914–1918, which required the expansion of heavy industry such as the iron and steel industry and the shipbuilding industry, and of manufacturing industry. Such expansion was a further spur to the development of systematic technical education.

What resulted from the growing concerns about education during the early decades of the twentieth century? Although the developments were not identical in each State, it can be said that in the early decades of the twentieth century State governments attempted to improve the provision of public education, including technical education. The articulation between the primary schools, and the senior technical schools, which were concerned with trade and technical training, was improved by the establishment of junior technical schools and continuation schools, and the inclusion of technical subjects in high schools to provide pre-vocational technical classes. Within technical education itself, the hierarchical relationship between industrial training at trade level and higher level courses was clearly established. The administration of technical education was brought under the umbrella of the States' administration of education.[21] However, there were some established technical colleges and schools of mines, especially in Victoria, which retained a distinctive autonomy in their governance, but even in that State there was a contemporary concern for the articulation between the technical schools newly established under the auspices of the Minister of Public Instruction and the other technical colleges which was evidenced by s 38 of the (Vic) *Education Act 1910*. That section provided that any technical schools which received any funds from the Consolidated Revenue could, by agreement between the Governor-in-Council and the Governing Body

of that school, come under the control of the Minister and the Education Department.

The reforms of the early decades of the twentieth century established the structures for the provision of technical and vocational education which would persist well beyond the 1950s. Local economic and political developments in each State influenced the nature and development of the particular organisational structures in each State. In New South Wales technical education had come under the control of the Department of Public Instruction in 1885, but it was not until 1912–1913 that reforms were made which provided technical education 'in primary schools and continuation schools all over the State, and in trades schools and technical colleges in the larger towns'.[22] In some jurisdictions, the junior technical schools and the senior technical colleges were established under the control of relevant State department, and were governed by the principal education legislation. In Victoria, the *Education Act 1910*, Part III, Division 3, ss 37–39 enabled the Minister to establish preparatory trade classes, trade schools and technical schools. There were also a number of quasi-autonomous council controlled technical colleges in Victoria, incorporated under the companies law, but which nevertheless needed public finance.[23] In South Australia the *Education Act 1915* s 34(1) provided that the Schools of Mines in Gawler, Kapunda, Moonta, Mt Gambier and Port Pirie were from 1916 to come under the control and management of the Minister and were to be known as technical schools and maintained and carried on as public schools. Both the Western Australian *Education Act 1928* s 3 and the Tasmanian *Education Act 1932* s 4 defined government schools to include technical schools. In Queensland there was legislation relating specifically to technical instruction and agricultural education, but the control of the latter was transferred from the Department of Agriculture to the Education Department in 1922.[24] The major technical colleges in each State provided both trade level courses and vocationally oriented diploma and certificate courses in a variety of fields, but particularly in the branches of engineering and commerce,[25] and in domestic science for women.[26] However, after the reform and expansion of the State education systems during the first three decades of the century, the great depression of the 1930s saw financial economies made in the operation of State education systems. Attempts to provide for the education of indigenous children varied from State to State, and some States did not place this fully within the remit of the Education Department until after 1950.[27]



Adult education also developed further during the first half of the twentieth century. During this period university extension classes, which had started at the University of Sydney and at the University of Melbourne in 1890, continued to provide liberal adult education for the middle class.[28] The Workers' Educational Association was established in Sydney in 1913 in conjunction with the University of Sydney to spread adult education further in the community. Subsequently WEA branches were established in the other States.[29] However, the provision of

funding was poor for adult education which sought to maintain the improving traditions of the mechanics' institutes movement as distinct from providing technical education, and the endeavours of the professional adult educators reached relatively few people in the community.[30]

## 2.2 The regulation of apprenticeship

At the turn of the century there was concern about the regulation of employment conditions of workers, that is matters relating to rates of pay, hours worked and health and safety in the workplace. Generally speaking, in the early decades of the twentieth century industrial relations legislation was passed in the several States to establish industrial boards and other tribunals, which were *inter alia* empowered to set minimum rates of pay for adults, juniors and improvers, and for apprentices in those trades where apprenticeship was the traditional form of training. However, during the first half of the twentieth century either in the industrial relations legislation, or in dedicated apprenticeship legislation (which was intended to operate in tandem with the industrial relations legislation in the regulation of apprenticeship), apprenticeship advisory bodies or apprenticeship commissions were established. Where dedicated apprenticeship legislation was passed, it was narrower in its scope than the industrial relations legislation, because it did not cover improvers, that is persons who were given on-the-job training to learn how to do a job, but who were not doing so under indentures or an agreement.[31] Two points may be noted about these fields of legislation. Firstly, the industrial relations legislation and the apprenticeship legislation in the several jurisdictions was generally similar, but was not identical. Secondly, it was introduced at different times in each jurisdiction and amended at different times. To provide a detailed history of the development of this legislation, particularly of the industrial relations legislation, and of the educational role of the statutory bodies which supervised apprenticeship education, is outside the scope of this research, but some examples of statutes regulating apprenticeship in the several States may be noted.

2.4

In New South Wales, during the first decade of the twentieth century there were a number industrial relations Acts passed which were consolidated in the *Industrial Arbitration Act 1912*. This Act in s 24(1)(d) empowered the industrial boards and the Industrial Court to make awards relating to the 'number or proportionate number of apprentices and improvers and the lowest prices and rates payable to them'. Subsequent amending legislation, the *Industrial Arbitration Act 1932* provided in s 10(1) for the appointment of an Apprenticeship Commissioner, and in s 10(2) for the appointment of apprenticeship councils for different industries to advise on the employment of apprentices. The *Industrial Arbitration Act 1936* s 8 amended the Act of 1932 to extend the powers of the Apprenticeship Commissioner, and the consolidating *Industrial Arbitration Act 1940* s 19 provided that the regulation of apprenticeship was a function of the industrial arbitration legislation. The *Industrial Arbitration Act 1940* s 28 provided

for Apprenticeship Councils, which could determine the conditions of apprenticeship, including the limitation of the numbers of apprenticeships in any trade or calling, and the extent of technical education to be provided for apprentices, and could ensure the attendance of apprentices at technical or trade schools.

In Queensland the *Industrial Arbitration and Conciliation Act 1932–36* replaced a series of Acts, which had begun with the *Wages Boards Act 1908* and the *Industrial Peace Act 1912*, and had included several industrial arbitration Acts passed between 1916 and 1929. The 1932 Act, in s 4, defined an apprentice as any person bound by an agreement 'for the purpose of being instructed in the knowledge and practice of any calling', and that 'industrial matters' included *inter alia* the number of apprentices an employer could employ and the minimum rates which could be paid to them. It also provided in s 12 that subject to the provisions of the *Apprentices and Minors Act 1929*, the Industrial Court was to have jurisdiction over minors under 21 years of age, and in s 68 that awards were to prevail over inconsistent contracts of service or apprenticeship, unless the terms of the contract were more favourable than the award. The Queensland *Apprenticeship Act and Minors Act 1929–1934*, which was a replacement for earlier apprenticeship legislation passed between 1924 and 1927, in s 4(1) provided that it applied to apprentices in trades listed in the Schedule to the Act. In s 6(1) of the Act required the registration of persons who wished to become apprentices, and s 7(1) empowered the relevant Minister to prescribe public examinations for entry to apprenticeship, and to determine which educational certificate gained its holders exemption from those examinations. Section 9(1) of this Act set up the Apprenticeship Executive to advise the Minister on matters relating to apprenticeship, and s 14(1) provided for Group Advisory Committees for each trade or group of trades. Besides providing comprehensively for the drawing-up of indentures, and their implementation, this Act also provided in s 39(3) for the payment of apprentices whilst attending at technical classes. The Apprenticeship Executive was given extensive responsibilities, and *inter alia* was empowered to prepare draft regulations dealing with matters such as in s 13(1) the number of apprentices to be employed and in s 13(3) with rates of pay for apprentices, and was in s 25 to determine the earliest and latest age at which apprenticeship could begin. Section 55 provided that this Act was to prevail over the industrial and conciliation legislation.

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In South Australia the *Industrial Code 1920–1936* in s 5(1) provided for the application of the Act to indentured apprentices under the age of 21, and for 'industrial matters' to include the number of apprentices who could be employed, the relationship of master and apprentice and the technical education or other training of apprentices, s 212 prohibited the payment of premiums for female apprentices, s 219 provided that the Division of the Act relating to apprenticeship applied only to industries 'for which an industrial board has been appointed, or in respect of which the determination of a wages board is in force'.

Sections 220–223A regulated the form of indentures, the requirements placed on the employer to instruct the apprentice, the circumstances in which indentures could be cancelled and forbad entry to apprenticeship after the attainment of the age of 20. In this State there was also dedicated apprenticeship legislation. The *Technical Education of Apprentices Act 1917* provided in s 11 for the establishment of an Apprentices Advisory Board, and in s 17 for the establishment of trade committees. This Act and its subsequent amendments were ultimately repealed by the *Apprentices Act 1950* which in s 5(1) defined 'apprentice' as including not only persons whom another person had in writing agreed to teach, 'whether or not the Industrial Code 1920–1950 applies to that trade or not', and any person who is a trainee apprentice, as defined in any award of the Commonwealth Court of Conciliation and Arbitration, in any trade. Sections 6–12 provided for the establishment of the Apprentices' Board, and ss 14–15 provided for the trade committees. The other provisions in the Act dealt in detail with the technical education of apprentices, which was removed from the definition of 'industrial matters' in the *Industrial Code 1920–1950*, and the indentures of apprenticeship and the supervision of apprentices.

Similar developments occurred in Tasmania. The initial wages boards legislation was passed between 1910 and 1920, and the *Wages Boards Act 1920* included in s 6 a definition of an 'apprentice' as a person bound by an indenture of apprenticeship under the age of 21, and the Wages Boards set up under this Act were empowered *inter alia* in s 23 to determine in relation to apprentices, the form of the apprenticeship indenture, the term of the apprenticeship which was to be not less than three years, and the number of apprentices who could be employed. Sections 49–54 dealt with matters relating to the payment of apprentices, and the formalities required for the formation of indentures, their registration, breach and cancellation. Subsequently, the Tasmanian *Apprentices Act 1942* established the Apprenticeship Commission in that State, and in subsequent industrial relations legislation in Tasmania, of which the *Industrial Relations Act 1975* s 29(10)(a) may be taken as an example, awards made under this legislation were expressed to be subject to the provisions of the *Apprentices Act 1942* which dealt with the same industrial matters as might appear in an award. The *Apprentices Act 1942* ss 4–8 provided for the Commission, and s 9 provided in detail for its powers which included *inter alia* the appointment of trade and advisory committees under ss 10 and 11, general supervision of the theoretical and practical training of apprentices, assessing apprentices and issuing certificates. The Commission in s 12 was empowered to proclaim trades, and ss 13–19 provided comprehensively for the regulation of indentures. *Inter alia* this Act in ss 20–21 set down the duties of employers and apprentices, and in s 22 prohibited the payment of premiums.

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In Victoria, factories and shops legislation passed from 1905 was the major vehicle for the regulation of employment conditions during the early decades of the twentieth century. The *Factories and Shops Act 1905* s 2 provided for the

appointment of Special Boards for any trade, business or occupation, and s 91 provided that these Special Boards could determine the numbers of apprentices and improvers to be employed. *Inter alia* s 92 provided for the experience of young workers to be taken into account in determining their wages, s 93 provided that unless an apprentice was indentured, he was to be regarded as an improver for at least three years, and s 96 allowed the Minister to grant a licence to a person over 21 years to work as an improver to gain full experience. Later amendments to these apprenticeship provisions included s 5 of the *Factories and Shops Act 1907* which provided that wages agreed to in indentures were to prevail over determinations of the Special Boards, and s 9 of the *Factories and Shops Act 1910* which allowed persons over 21 years of age to apply for apprenticeship with the sanction of the Minister. There was subsequent consolidating legislation, the *Factories and Shops Act 1915*, which was itself subsequently amended during the 1920s. The consolidating Act the *Factories and Shops Act 1928* in s 3 defined an apprentice as a person under 21 years of age, bound by an indenture approved by the Secretary of Labour. Section 190 provided that the Act was to be read subject to the *Apprenticeship Act 1928*, and s 191 empowered Wages Boards to determine the rates to be paid to apprentices, the number of apprentices who could be employed in any trade, and to prescribe the form of apprenticeship indentures to be used. The Wages Boards could also approve the courses of technical education, including correspondence courses, to be undertaken by apprentices. Section 192 provided that the wages to be paid were those in the indenture, which under s 194 was not invalidated by not being sealed. Provision was made in s 196 for penalties for failure to carry out the terms of an indenture, and s 197 enabled the Secretary for Labour to vary the time of an indenture and to indenture persons over 21 to enter apprenticeships. Sections 199–201 prohibited the payment of premiums for apprentices and improvers. It may be noted that similar provisions were included in the *Labour and Industry Act 1953*, ss 3(1), 165–173. The *Apprenticeship Act 1928* ss 7–13 established the Apprenticeship Commission and a scheme of trade committees and advisory committees to promote apprenticeship in defined apprenticeship trades. Section 14 of the Act limited its application to apprenticeship trades, and the Apprenticeship Commission under ss 15–18 controlled the number of apprentices to be employed in these trades, and in ss 19–40 the terms and conditions of apprenticeship, including the requirements for apprentices to attend classes and the transfer of indentures. Section 32 prohibited the payment of premiums, and s 38 empowered the Commission to draft regulations relating to the minimum age for entry to apprenticeships, the standard of education to be required, the theoretical education to be undertaken, and the rates of pay throughout the period of the indentures.



There were a number of changes to the Western Australian industrial relations legislation in the first decade of the century but the *Industrial Conciliation and Arbitration Act* was amended in 1909 to empower the Arbitration Court in that State to include in the definition of 'industrial matters' s 2(g) matters such as

determinations governing who could become an apprentice, the number of apprentices who could be taken on by any one employer, the terms and conditions of the indentures of apprentices, the registration and examination of apprentices, and the rights and duties of employers and apprentices.[32] The major Act for the first half of the century was the *Industrial Arbitration Act 1912–1949*, the basic apprenticeship provisions of which were based on those of the 1909 Act. This Act provided in s 6(f) that who may become an apprentice, the number of apprentices to be taken by one employer, the method of binding apprentices, the terms and conditions of apprenticeship, the registration of apprentices, the examination of apprentices, the rights, duties and liabilities of parties to any apprenticeship agreement, the assignment of apprentices, the dissolution of apprenticeships and disputes about apprenticeship agreements were industrial matters. Section 128 provided for the appointment of an Apprenticeship Board, which was empowered to supervise the construction, transfer and abrogation of indentures, and s 129 provided *inter alia* for the prohibition on the payment of premiums, and for the technical instruction of apprentices to be at the employer's expense. Section 130 provided for the registration of apprentices, and s 131(1) for the power of the Industrial Court, with the approval of the Governor, to make regulations governing apprenticeships, although s 131(2) provided for the Governor on the recommendation of the Apprenticeship Board to make regulations prescribing the wages to be paid to apprentices in the building trade, when such wages were not fixed by an industrial agreement or award. It was not until 1964, after the passing of the *Industrial Arbitration Act Amendment Act (No2) 1963*, that an Apprenticeship Advisory Council was set up.[33]

It is evident that there was a clear policy and practice that the regulation of training was legitimately part of the regulation of the workplace. However, it was not only the States which participated in the regulation of the workplace. The federal *Conciliation and Arbitration Act 1901* established the federal conciliation and arbitration system with power under the Constitution s 51 (pl xxxv) to deal with industrial disputes across State boundaries. Again, it is not necessary within the limits of this research to explore the historical development of the federal industrial relations jurisdiction, or the interpretation over the decades of the arbitral and judicial powers of the bodies which were set up to exercise the powers of conciliation and arbitration under s 51 (pl xxxv). What is important is that it may be noted that throughout the twentieth century, determinations could be made concerning the terms and conditions of employment of all workers, including apprentices, where industrial disputes came before the federal Conciliation and Arbitration Court (1904–1956) and the federal Conciliation and Arbitration Commission (1956–1988), the functions of which are currently carried out by the Australian Industrial Relations Commission and the Industrial Division of the Federal Court. What this meant for the regulation of apprenticeship was that there was not only the influence of State industrial laws, but there could also be the influence of federal awards and agreements. It has been noted that the concept of the basic wage and margins, included secondary

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wages which recognised the skilled worker, and thus distinguished between the unskilled labourer and the tradesman, was fundamental to wage fixing in Australia from the Harvester Judgement in 1907 until 1966, and that the acquisition of the tradesman's workplace skill depended upon the completion of an apprenticeship in a recognised trade or craft.[34]

## 2.3 The Commonwealth and education

Given that constitutionally the Commonwealth had no head of power relating to education *per se* it is not surprising that in the period up to 1939 the Commonwealth provision of educational services was minor and related to areas such as the defence forces and the health of children.[35] After the outbreak of war in 1939 Commonwealth involvement in matters educational increased. Not only were wartime industry and manpower policies put in place, but there was also increased concern about scientific training, and the Universities' Commission was established in 1942. The Curtin Government's Constitution Alteration (War Aims and Reconstruction) Bill foreshadowed that the Commonwealth Government would take responsibility for matters such as health, child welfare and vocational training. Although the High Court held in 1943 that regulations governing university enrolments were invalid, because the Commonwealth had no power to make laws about education,[36] the Commonwealth Government in 1943 provided scholarships for students in certain university faculties and for engineering students at technical schools. The seeds were being planted for the growth of Commonwealth funding of education and the growth of Commonwealth influence on the development and implementation of education policy.

# 3 The Commonwealth and education after 1945

At the end of World War II there were a number of developments which helped to establish the Commonwealth's role in the provision of education. The need to re-establish members of the Australian armed forces in postwar civilian life led to the passing of the Commonwealth *Re-Establishment and Employment Act 1945*. This Act included provisions relating to the suspension, revival and variation of contracts of apprenticeship, and to the modification of conditions of entry to employment in any profession, occupation, business, trade or industry for discharged members of the forces. The Commonwealth Employment Service was established by s 47 of this Act and ss 50–54 provided for the establishment of the Commonwealth Reconstruction Training Scheme (CRTS) for the vocational training, including professional training, for ex-service personnel. Regional Training Committees, industrial committees and professional committees were established. The CRTS further stimulated Commonwealth involvement in the funding of the States' technical education systems.[37]

The validity of the Commonwealth *Education Act 1945*, in which the 1943 scholarship scheme was subsequently included, was not assured until the passing of the social services amendment to the Constitution, s 51 (pl xxiiiA), at the 1946 referendum. This amendment represented yet another development of the involvement of the Commonwealth in education, because it allowed the provision of benefits to students. The 1950s saw the further development of Commonwealth scholarship schemes for higher education, and the 1960s saw the extension of these scholarship schemes to secondary education. Using the Commonwealth's financial powers, that is the appropriations power in s 81 of the Constitution and the grants power in s 96 of the Constitution, Commonwealth funding for education generally was further extended during the 1960s. For example, there were grants to the States for capital works in 1964 and in 1968, for libraries, in both government and non-government schools. Funding was continued for higher education following the *Report of the Committee on Australian Universities* (the Murray report) in 1957, and the *Report of the Committee on the Future of Tertiary Education in Australia* (the Martin report) in 1964. The binary system of higher education which provided for both universities and colleges of advanced education, which included the major technical colleges, was developed from the late 1960s. Commonwealth involvement in matters educational led to the Commonwealth Office of Education becoming the Department of Education in 1967. During the 1950s and 1960s there was also increased Commonwealth involvement in the provision and funding of Aboriginal and Torres Strait Islander education throughout Australia generally.[38]

From the mid-1950s there had been concern about technical education and its funding. In 1954 the *Commonwealth-State Apprenticeship Inquiry: Report of Committee* (the Wright report) was published and during the next twenty years there were several State and federal reports on technical education.[39] In 1956 the Australian Apprenticeship Advisory Committee was established to facilitate Commonwealth/State co-operation in vocational education. The 1964 *Report of the Committee on the Future of Tertiary Education in Australia* (the Martin report) recommended federal funding of technical colleges, and this assisted the growth of the tertiary college sector.[40] Technical schools and some technical colleges, initially only in Victoria and South Australia, benefited from federal funding after the passing of the Commonwealth *States Grants (Science Laboratories and Technical Training) Act 1964*. There was further legislation passed in 1965 and 1968, but the federal funding for technical education generally did not come until a decade later following the publication of the 1974 report *TAFE in Australia: Report on needs in Technical and Further Education* (the Kangan report). The Kangan report legitimised and defined the technical and further education sector, henceforth identified under the acronym of TAFE.[41] In 1985 the *Report of the Committee of Inquiry into labour market programs* (the Kirby report) would record:

> *Substantial Commonwealth funding for TAFE in Australia came late, relative to other sectors of education. Earlier, the Commonwealth had acted on the recommendations of inquiries chaired by Murray (1957), Martin (1964) and Karmel (1973) by providing*

*substantially increased Commonwealth funding for universities, CAEs and schools, respectively. By 1975, the neglect of the remaining area of education, TAFE, was apparent, if only from the fact that TAFE was attempting to operate in the unwanted and neglected buildings formerly occupied by universities, CAEs and schools.*[42]

However, the introduction of this funding did not affect the fact that the statutory framework relating to the provision of technical education, whether at tertiary college level, or at technical school, or post-compulsory trade and middle level, remained under the legislative control of the States and Territories. It may be noted that the Commonwealth Minister responsible for education became a full member of the Australian Education Council (AEC), a Ministerial forum on educational matters for the States and Territories, only in 1972.[43]

The Commonwealth industrial relations power enabled it, through federal awards, to influence the regulation of apprenticeship, although statutory regulation of apprenticeship was largely within the jurisdiction of the States and Territories. However, the Commonwealth *Tradesmens' Rights Regulation Act 1946* provided protection for skilled workers, in the metal trades and the other trades to which it applied, by regulating the entry to those trades of persons who had not completed an apprenticeship in Australia.[44] The Act was amended in 1958 to cover Australians who gained skills by informal upgrading, ex-service personnel who had undertaken adult trade training in the armed services, and migrants. The arrangements made with the technical education sector under this legislation did provide an alternative means of obtaining trade qualifications outside apprenticeship.[45]

Despite interest in the provision of adult education towards the end of World War II, and the preparation of the Duncan report of 1944 to the Universities' Commission urging the establishment of a system of Commonwealth and State adult education authorities and appropriate funding, neither national policy nor funding eventuated. In some States—Queensland, Tasmania and Victoria—the establishment of statutory boards led to a decline in the activities of the WEA and university extension programs, but in the other States the other agencies, including university departments and State education departments, remained involved in the provision of adult education.[46]



# 4 The focus on training for employment from the 1970s to the early 1990s

In the 1970s and 1980s new economic problems, such as rising oil prices, rising inflation and demands for higher wages emerged in Australia. A significant consequence of the emergence of these economic problems was increasingly high levels of unemployment, including youth unemployment, and increased concern about vocational training. The focus on vocational education during the 1970s was sharpened by the deterioration of the labour market which led to government intervention by means of labour market programs, a development

which had occurred in North America and Europe in the 1950s and 1960s.[47] It may be noted that labour market programs generally include:

- ❖ government initiatives which provide for the improvement of skills in the workforce so that industries become more efficient
- ❖ programs which provide for the development of new skills in the workforce so that people can move from industries which are in decline to new industries
- ❖ programs which provide training so that unemployed persons could gain vocational skills which would enable them to enter the labour market[48]

Some of these employment and training programs were introduced in the early 1970s.[49] After the 1974 *Australian labour market training: Report of the Committee of Inquiry into labour market training* (the Cochrane report) several significant labour market program reforms were introduced. For example, the National Employment and Training System (NEAT) was introduced in 1974.

> *This replaced the 14 earlier employment and training programs targeted to specific groups. Its diverse range of objectives included: alleviating unemployment; increasing the overall skill levels of the labour force; assisting the disadvantaged; increasing job security; and promoting regional development. Financial assistance was provided to those undertaking training, either through a formal course at an educational or vocational institution or through on-the-job training. At its peak in 1975–76, some $39.1 million was spent on the program.*[50]

The National Apprenticeship Assistance Scheme (NAAS), which became in 1977 the Commonwealth Rebate for Apprenticeship Full-time Training Scheme (CRAFT), was a major trade training initiative. Late 1970s schemes such as the Special Youth Employment Training Program (SYTEP), the Community Youth Support Scheme (CYSS), the Education Program for Unemployed Youth (EPUY), and the School to Work Transition Program (SWTP) were directed towards the problems of providing training for unemployed youth.[51] The Training for Aboriginals Program was introduced in 1980.[52] These labour market programs were chiefly concerned with improving the quality of labour, but subsequently in the early 1980s there was increased emphasis on job creation programs, which were concerned to increase the demand for labour.[53]

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The Federal Labor Government, elected to office in 1983, was concerned that there should be economic and social reforms, including labour market reform. A key instrument in the implementation of the Federal Government's economic and social reforms was the development of the Prices and Incomes Accord in 1983 after a national economic summit between the government, business and labour. The Accord has been described as:

> *. . . a series of trade-offs between ACTU commitments to wage restraint and industrial harmony and ALP commitments to policies promoting full employment, welfare services and industrial revitalization.*[54]

Concern about unemployment and about education and training continued unabated during the early 1980s. A decline in numbers of apprentices in 1982–1983 led to the introduction of the Trade Based Pre-Employment Courses (TPBE),

which were intended to maintain the general level of trade and trade-related courses. These courses were much more expensive than the traditional apprenticeships, and the States were required to fund additional pre-apprenticeship courses, a requirement which changed the profile of the work of TAFE colleges and which caused some tension.[55] The Participation and Equity Program (PEP) was also initiated in 1983 and would last until 1987. The Department of Employment and Industrial Relations, the Commonwealth Tertiary Education Commission and the federal Department of Education were responsible for its administration. It was intended to meet the education and training needs of 15–19 year olds 'by improving the quality and range of courses available to less able and unemployed young people; to expand school-TAFE collaboration, and offer a progression of skills leading to formal recognition on completion of a basis for further education and training'.[56]

In 1985 a substantial review of labour market programs was presented in the *Report of the Committee on labour market programs* (the Kirby report). This report was critical of the existing labour market programs including the absence of defined overall priorities, the *ad hoc* development of programs, the confusing number of schemes, and the failure to develop appropriate links between labour market programs and other areas such as post-secondary education and income support.[57] Its 86 recommendations were designed to set a new direction for labour market policy. It recommended *inter alia* 'the development of a system of traineeships which would combine broad-based vocational education and training and work in a related occupation, to form an integrated training system'.[58] Following the recommendations of the Kirby report, several new programs were introduced in 1985 and 1986. The joint Commonwealth/State administered Australian Traineeship system (ATS) was introduced in 1985. Employers and TAFE providers were paid financial incentives to offset the costs of the provision of on-the-job and off-the-job training. Trainees were provided with both on-the-job training and off-the job training at a TAFE college for a minimum period of thirteen weeks. Training in non-trade areas which traditionally had little provision for training was to be introduced.[59] In 1987 the Youth Training Program (YTP) and the Adult Training Program (ATP) were introduced to provide job seekers, who had been unemployed for six months or more, or who were disadvantaged in some way, with opportunities for undertaking approved training courses either in the TAFE system or with private providers or industry based training.[60]



From 1986 to 1988 there were a number of significant federal government reports and policy statements which advocated labour market reforms. Of particular significance was the Australian Council of Trade Unions' and the Trade Development Council's report *Australia reconstructed*. The report linked education and training, productivity, worker-management co-operation and industrial peace.[61] Its recommendations included the development of 'active' labour market and training programs, and the establishment of a National Employment and Training Fund to support skill formation and training, as well as

recommendations relating to wages policy, industry plans and industrial democracy.[62] Of particular significance was its emphasis on the needs of the labour market and the introduction of the concept and terminology of 'skills formation'.[63]

In 1987 the Commonwealth Government published *Skills for Australia*. This clearly articulated the government's belief that 'education and training systems should play an active role in responding to the major economic challenges now facing Australia'.[64] Education and training were expected to play a vital role in developing a labour force with broad-based and transferable skills and the capacity to meet the labour market needs of industry. Specific actions identified as being required included:

- increasing participation in education and training
- improvement of the flexibility of education and training systems to improve the quality, breadth and adaptability of skills acquired
- improvement of the distribution and balance of the national education and training effort to meet the long-term needs of the economy and the labour market
- increasing private sector investment in training and skills formation

A noteworthy aspect of the proposals in *Skills for Australia* was the Federal Government's commitment to improve the employment and training opportunities for unemployed and otherwise disadvantaged members of the community and for women. Measures to integrate income support and labour market assistance were announced, as were measures to reduce the high degree of occupational segregation in labour markets and to improve the training opportunities for women.[65]

In *A changing workforce*, published by DEET in 1988,[66] it was pointed out that training takes place in an industrial relations framework and reflects the organisational and occupational structures determined by that framework. It was further proposed that in most industries there was a need to rationalise job classifications in awards and to reduce job demarcation, which would allow training to be more broadly based and a multi-skilling approach to be adopted. It was also pointed out that structured training did not exist for a large number of occupations, particularly those which were traditional female occupations. This document urged that vocational education and training should move from dependence upon a 'time served' approach to a 'competency-based approach', which focussed on achieving specified standards of skill. It also argued for more industry-based formal training provision and proposed that industry investment in education and training should be increased.

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There was also concern to develop policy relating to reform in industrial relations. There was concern that the industrial relations system should become more flexible in the recognition of skills. The traditional demarcation of trades and jobs was reflected in industrial awards. As part of the reform program a

process of award restructuring was introduced to remove obsolete job classifications, to develop new and more appropriate classifications, and to establish links between training, skills and wages. In the foreword to *Labour market reform: The industrial relations agenda* in 1988, the then federal Minister for Industrial Relations, the Hon. R Willis, MP, identified labour market flexibility as being high on the Federal Government's micro-economic reform agenda. Award restructuring was to be the key feature of the reform process. From 1988, as the result of a decision of the federal Industrial Relations Commission, the Structural Efficiency Principle (SEP) was to be applied in awards.[67] In *Labour market reform: The industrial relations agenda* national consistency in training standards and curriculum and provision for the national accreditation of skills were also identified as necessary changes. This document emphasized the need for a better trained, more broadly skilled, flexible workforce, with training at all levels from entry level training to the retraining of adults. *Inter alia* award restructuring negotiations would require proper classification of jobs and the level of expertise required, specification of training requirements, and the establishment of 'appropriate competency standards, accreditation and credit arrangements . . . prior to assessment of any new classification rates', and award restructuring would be processed through the relevant industrial tribunal.[68] However, there would be difficulties: the process would be time-consuming, and the parties:

> *. . . need to engage in an extensive process of negotiation, involving a detailed examination of skill requirements, classification and wage structures (including the extent and basis of overaward payments), and other aspects such as working time arrangements. It also involves a consideration of the implications for training, both in-house and institutional.*
>
> *The restructuring of awards to provide for broader job classifications and skills will most likely alter traditional occupational wage relativities. Old ideas about the status and importance of a particular job classification and its traditional place in the classification structure and workplace culture will need to change. This will require relinquishing additional craft-based attitudes and jealousies as well as recognition that any wage rate adjustments resulting from award restructuring will most likely result in differing levels of increases; some workers will obtain greater increases than others.*[69]



The development of these policies relating to labour market reforms which were focussed on the improvement of the skills of the workforce to meet the needs of industry and the reform of industrial relations policy to become more flexible in the recognition of skills led to the development of the national industry training policy known as the National Training Reform Agenda (NTRA). Commentators have summarised the developments in these words:

> *In a rare coalescence of government, union and employer resolve, the National Training Reform Agenda (NTRA) grew out of the aftermath of* Australia reconstructed. *Though sharing divergent agendas relating to national economic reform and electoral survival, profit and full employment respectively, each of the parties worked toward the radical restructuring of existing industrial and labour*

*market relationships. Buoyed by the 1983 Accord which tempered union wage claims and the August 1988 Structural Efficiency Principle (SEP) which sought to restructure traditional workplace practices, including union demarcation, and to provide 'consistent, coherent work structures' based on training and skills acquired, the bureaucratically-managed reforms grew at an ever increasing pace.*[70]

The federal legal framework which enabled the development of the NTRA through administrative and executive action was put in place in the late 1980s and the early 1990s.

# 5 Towards the development of a national legal framework for VET from the 1970s to the 1990s

## 5.1 Developments in the States' and Territories' legal frameworks for vocational education

Two significant developments in the State legislation relating to the legal framework of vocational education occurred during the period from the 1970s to the early 1990s. One development was the introduction of the concept of the 'declared vocation' or the 'declared calling', which encompassed both traditional apprenticeship and the traineeship featured in the labour market programs, into the apprenticeship legislation in the States and Territories.[71] The second development related to changes in the organisational structures for the public provision of technical and further education. The timing of the legislative developments varied from jurisdiction to jurisdiction during this period, and in some jurisdictions the initial legislation was superseded by later legislation. The legislative changes which had taken place by the early 1990s are outlined below.

The legislation which embodied the changes to apprenticeship were:

- in the ACT the *Vocational Training Act 1989*, which would be replaced in 1995 by the *Vocational Education and Training Act*
- in the Northern Territory, the *Northern Territory Employment and Training Authority Act 1991* had replaced the *Industries Training Act 1979*
- in NSW the *Industrial and Commercial Training Act 1989*, subsequently supplemented by the *Board of Vocational Education and Training Act 1994*
- in Queensland, the *Vocational Education, Training and Employment Act 1991* which replaced the *Industry and Commerce Training Act 1979*
- in South Australia, the *Industrial and Commercial Training Act 1981* which would be replaced by the *Vocational Education, Employment and Training Act 1994*
- in Tasmania, the *Industrial and Commercial Training Act 1985* was subsequently superseded by the *Vocational Education and Training Act 1994* and the *Tasmanian State Training Authority Act 1994*

- in Victoria, the *Vocational Education and Training Act 1990* replaced the *Industrial Training Act 1975* and the *Post-Secondary Education Act 1978*
- in Western Australia, the *Industrial Training Act 1975* would also be replaced by the *Vocational Education and Training Act 1996*

As far as the changes in the organisational structures for the public provision of technical and further education were concerned, it may be said that generally speaking, whatever the structures adopted, their effect was to strengthen the recognition of the identity of technical and further education within the regulatory framework. This was reflected in the establishment of statutory authorities, or statutory advisory bodies, and industry advisory committees to provide advice on the work of the institutions providing technical education, including matters such as the nature of the vocational education and training programs, the accreditation of programs and liaison with industry, commerce and the community. In the early 1990s, in most jurisdictions, a key statutory authority in the State or Territory would become the State Training Agency, for the purposes of the (Cwth) *Australian National Training Authority Act 1992*. The regulation of the employment of staff was generally initially governed by traditional 'teaching service' style legislation, but this had moved in several jurisdictions to regulation under public sector management legislation. New South Wales and South Australia have retained the traditional regulatory style, but Victoria had moved by the early 1990s to an institute employment model, in which staff were no longer employees of the Crown. However, again, the legislative structures which were developed in the past twenty-five years were certainly not identical in each jurisdiction.

The *ACT Institute of Technical and Further Education Act 1987*—now titled the *Canberra Institute of Technology Act 1989*—in ss 4–10 established the Institute of Technical and Further Education. Initially the employment of staff was regulated by the (Cwth) *Teaching Service Act 1972*, but currently this is regulated under the ACT public sector management legislation. The Northern Territory *Education Act 1979* ss 41–55 provided for TAFE colleges, and the *Northern Territory University Act 1989* ss 20–23 established the Institute of TAFE, on the basis of the original Darwin Community College, which in 1984 had become known as the Darwin Institute of Technology.[72] The Northern Territory Employment and Training Authority, which replaced the Vocational Training Commission established in 1979, was established under s 6 of the *Northern Territory Employment and Training Authority Act 1991*. As in the ACT, the employment of staff under the *Education Act 1979* was regulated by the (Cwth) *Teaching Service Act 1972* but was subsequently to be regulated under the NT public sector management legislation.



In New South Wales the *Technical and Further Education Act 1974* s 6 provided for the replacement of the Department of Technical Education with the Department of Technical and Further Education, and s 13 established the Council of Technical and Further Education, which was to include in its membership representatives of industry, commerce, the professions, the trade union

movement, educational authorities and the community. Section 19 established the Vocational Institutions Advisory Committee and s 20 provided for the registration of institutions and schools providing technical education. Section 26 provided for the establishment of college or district councils or committees for technical colleges. This organisational structure would be replaced in the current *Technical and Further Education Commission Act 1990*, which maintained a traditionally centralized organisation for TAFE institutes in that State, and which regulated the employment of staff.

In Queensland the *Industry and Commerce Training Act 1979* established the Industry and Commerce Training Commission and a system of advisory committees. Subsequently, s 5 of the *Employment, Vocational Education and Training Act 1988* established the Employment, Vocational Education and Training Corporation, but this Act was superseded by the *Vocational Education, Training and Employment Act 1991*, s 6 of which provided for the establishment of the Vocational Education, Training and Employment Commission. However, in Queensland the staff are employed under the Queensland public sector management legislation.

In South Australia the *Technical and Further Education Act 1975* left responsibility for the administration of technical and further education with the Minister and his department, and the college councils, but s 10A empowered the Minister to appoint advisory councils. This Act also regulated the employment of staff in the TAFE sector. However, the *Industrial and Commercial Training Act 1981* ss 8–13 established the Industrial and Commercial Training Commission, but this would be superseded by the *Vocational Education, Employment and Training Act 1994* s 9 of which provided for the establishment and functions of the Vocational Education, Training and Employment Board.

In Tasmania the administration of technical schools remained initially with the Department of Education, although subsequently the employment of staff was regulated by the *Tasmania State Service Act 1984*. The *Industrial and Commercial Training Act 1985* s 5 established the Training Authority of Tasmania. Subsequently, under the *Vocational Education and Training Act 1994* s 6, the successor to this body, the Tasmanian State Training Authority established under the *Tasmanian State Training Authority Act 1994* was continued.

The Victorian *Industrial Training Act 1975* was amended in 1981 to establish the Industrial Training Commission, which replaced the Apprenticeship Advisory Council and the Victorian *Post-Secondary Education Act 1978* established the Technical and Further Education Board, but the regulation of the management of TAFE institutes remained with the relevant government department. These Acts would be superseded in 1990 by the *Vocational Education and Training Act 1990*, s 8 of which established the State Training Board. Subsequent amendments in 1993 to this Act increased the managerial autonomy of TAFE institutes in that State, and provided that the director of the TAFE institute, not the Crown, was to be regarded as the employer of staff.

In Western Australia the Industrial Training Council was established under the *Industrial Training Act 1975* and replaced the Apprenticeship Advisory Council. As far as the administration of the TAFE colleges was concerned, the *Colleges Act 1978* was the controlling legislation, and this empowered the college councils as the governing authorities responsible for the management and operation of the major colleges. The *State Employment and Skills Development Authority Act 1990* established the State Employment and Skills Development Authority to promote the co-ordination of State and Commonwealth skills formation services, policies and programs. The *Vocational Education and Training Act 1996* has recently repealed and replaced these Acts.

Generally, changes to adult and further community education were incorporated into the principal Acts, but in some jurisdictions such as New South Wales, where the *Board of Adult and Community Education Act* was passed in 1990, and in Victoria, where the *Adult, Community and Further Education Act* was passed in 1991, there was separate dedicated legislation.

Although the development of legislative framework for TAFE and VET remained the prerogative of the States and Territories, there is considerable evidence of increasing co-operative endeavour by the States and Territories in the development of policy relating to the TAFE sector during the 1970s and early 1980s. The Australian Conference of TAFE Directors (ACTD) had its origins in the meetings of State officers who had met to co-ordinate technical training during World War II. By the late 1970s it had become a significant body in the encouragement of the development of national policy relating to TAFE. For example, a National Centre for TAFE Research, originally proposed in the Kangan report, was established in Adelaide in the early 1980s. Under the direction of the Curriculum Projects Steering Group (CPSG), which was later to be known as the Australian Committee on TAFE Curriculum (ACTC), a system for the collection of national TAFE statistics was developed under the Joint Committee on TAFE statistics (JCTAFES). In 1984 a national awards system had been proposed to the AEC by the ACTC. TAFE courses were to be classified according to a nationally consistent nomenclature, but the assessment and accreditation of courses would remain a responsibility of the States and Territories. A national register of courses was to be established and administered by an Australian Council of Tertiary Awards (ACTA), which would *inter alia* issue guidelines for the registration and periodic re-registration of TAFE courses. ACTD also influenced the improvement of financial support for TAFE students.[7] The impetus for the development of national TAFE policies would continue to increase during the late 1980s and the early 1990s.



## 5.2 Federal legislative and administrative developments from the 1970s to the early 1990s

The introduction of labour market programs and the increased concern for vocational education and training during the 1970s, the 1980s and the early 1990s

were accompanied by legislative and administrative changes in the Commonwealth jurisdiction which facilitated the further development of the NTRA. The administrative changes would include the setting up of corporations, such as the National Training Board established in 1991, to carry out some of these development functions.

In the federal jurisdiction the Commonwealth Tertiary Education Commission (CTEC) was established under the *Commonwealth Tertiary Education Commission Act 1977*, as were the Universities' Council, the Advanced Education Council and the Technical and Further Education Council (TAFEC). TAFEC administered the increased Commonwealth funding for TAFE.[74] Further, the Commonwealth Employment Service (CES) was given a new legislative home in the *Commonwealth Employment Service Act 1978*, by the repeal of ss 47–49 of the principal Act by the *Re-Establishment and Employment Amendment Act 1978*. The CES was authorised, as part of the federal Department of Employment and Industrial Relations (DEIR), to administer the labour market programs. These were described in s 3 of the Act as manpower programs:

> *'manpower program' means a program, scheme or arrangement designed to provide persons, or classes of persons, with employment, either generally or in a particular way, to enhance persons' opportunities for obtaining employment, to facilitate the movement of labour between occupations, between industries or between places or otherwise improve the functioning of the labour-market, including any program, scheme or arrangement for assisting employers to obtain or retain employees or for training persons, in the course of their employment or at institutions, or both, in skills relating to employment.*

Subsequently, the Commonwealth *Community Employment Program Act 1983* was passed to set up the Community Employment Program (CEP) from 1983–1987. However, as the labour market programs of the late 1970s and early 1980s were introduced, responsibility for their funding was divided between the DEIR and the federal Department of Education.[75] These programs were implemented in a variety of ways: for some matters, for example, allowances, regulations or statutory rules provided the detail of the policy, but for other matters, the exercise of executive discretion and of delegated powers was preferred.

In addition to changes in legislation, new training advisory bodies were established by federal executive action. The National Training Council was formally set up in 1974 to advise the Minister:

> *. . . on the development, operation and promotion of labour force training policies, priorities and programs. In its efforts to improve training at all occupational levels and all sectors of industry and commerce, the Council works in close co-operation with government, employer, trade union, technical and further education and other appropriate bodies and authorities.*[76]

The early 1970s also saw the development of the Industry Training Committee (ITC) Network of both Commonwealth and State committees, which involved government, unions and employers, to provide both advice to government and training.[77]

The Kirby report of 1985 had recommended that there be changes to advisory structures for employment and training, and it has been noted already that from the 1970s a number of government departments were involved in the administration of labour market programs. Given the nature of the landmark policies of the later 1980s and the broadening of the range of labour market programs which involved training components, it is not surprising that there were also further changes in both legislation and advisory bodies. It is beyond the scope of this overview to do more than indicate some of the major changes which occurred. A tripartite review of administrative structures—by government, employers and unions—was established. In 1986 the Australian Council for Employment and Training (ACET) replaced a number of existing advisory councils, with representatives from government, unions, employers and the community, but this body would not survive beyond 1987.[78] However, CTEC also would not survive beyond 1987, and major reorganisation of the Federal Government departments would occur in 1988. In the mid-1980s tension arose between CTEC, the DEIR and the Department of Education because of the number of bodies funding programs in the TAFE sector.[79] In 1987 the federal Department of Employment, Education and Training (DEET) was established. This super department replaced the former Department of Education, the employment division of the DEIR, the Office of Youth Affairs and the TAFE section of CTEC.[80] It:

> *. . . institutionalised the need to manage micro-economic reform through the Ministerial co-ordination of workplace restructuring, employment, labour market reform, and general and vocational education and training.*[81]

Legislative change entrenched new structures. Section 6 of the *Employment, Education and Training Act 1988* established the National Board of Employment, Education and Training (NBEET), which was *inter alia*, to become involved in the development of policy relating to education and training. Section 23 established a number of councils including the Employment and Skills Formation Council, which was empowered to inquire into and provide advice, either at the request of the Minister or of the Board, or on its own motion, on:

*(i) a matter relating to employment, technical and further education or the formation of skills and, in particular, but without limiting the generality of the foregoing, a matter relating to:*

*(A) employment policies, programs or services*

*(B) the general development of technical and further education*

*(C) the marketing overseas of technical and further education programs developed in Australia*

*(D) the establishment of priorities to be given in dealing with the needs of technical and further education institutions or other institutions providing technical and further education in respect of buildings, equipment, staff and other facilities*

(E) *the funding, planning and implementation of programs aimed at meeting such priorities referred to in sub-subparagraph (D) as have been, or may be established*

(F) *the granting of financial assistance by the Commonwealth to technical and further education institutions and other institutions offering technical and further education*

(G) *policies, programs, or services for the formation of skills or*

(H) *the promotion of effective training in the business and industrial sectors or*

(ii) *any other matter on which information or advice may reasonably be required by the Minister or the Board in conjunction with information or advice in respect of a matter referred to in subparagraph (i).*

Section 40 of this Act also established a Commonwealth/State Consultative Committee which was empowered to advise other councils established under the legislation. Section 48 of the Act provided for yet another new legislative home for the CES which reflected its new departmental location. This Act, which made provision for advisory councils for higher education and school education, also repealed the *Commonwealth Schools Commission Act 1973*, the *Commonwealth Tertiary Education Commission Act 1977* and the *Commonwealth Employment Services Act 1987*. It also set up the most comprehensive federal advisory council system for the development of national educational policy, especially as this related to the dissemination of federal funding, for all sectors of education including TAFE. However, one historian has noted that:

> *. . . the establishment of DEET and the demise of CTEC marked the beginning of a new era of TAFE, one of dislocation, constant restructuring and increased tensions between the Commonwealth and the States.*[52]

Although the major part of the funding for TAFE and vocational education continued to be the responsibility of the States and Territories, Commonwealth funding for recurrent and capital expenditure in TAFE and vocational education was well established, with the *States Grants (TAFE Assistance) Act 1989* being the principal Act by the end of the decade. In the 1987 statement, *Skills for Australia*, the government had announced that funds for capital grants and equipment grants for TAFE were to be allocated on the basis of competitive bidding, and that restructured labour programs were also to be open to competitive bidding by TAFE institutions and private providers. There were other developments in the funding arrangements from 1988, including a relaxation of the prohibition on the charging of fees, but these changes, driven by the exercise of the Commonwealth's financial powers, did not always meet with the full approval of the States and Territories.[53] The *States Grants (TAFE Assistance) Act 1989* was subsequently amended by the passing of the *Vocational Education and Training Funding Act 1992*, which contained provision not only for the allocation of monies by the newly established Australian National Training Authority (ANTA), but also provisions relating to the funding of labour market programs such as the

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Australian Traineeship System, Career Start Traineeships and National Training Wage Traineeships. Finally, the Training Guarantee Scheme, established under the *Training Guarantee Act 1990* and the *Training Guarantee (Administration) Act 1990* may be noted. The object of this legislation was to guarantee a minimum level of expenditure by employers on quality employment-related training. If the minimum level of expenditure, determined as a percentage of the payroll, was not reached in spending on eligible training programs, the shortfall was to be paid to the Australian Tax Office to fund additional training.

Given that there was put in place after the passing of the *Employment, Education and Training Act 1988*, the most comprehensive federal educational bureaucracy and advisory council system which the nation had seen during the twentieth century, it is not surprising that the Federal Labor Government's momentum for the development of a national industry training policy did not falter in the later 1980s and early 1990s. Policy statements relating to industry training continued to appear: in 1988, *Industry training in Australia: The need for change*;[84] in 1989, *Improving Australia's training system*;[85] and in 1990 NBEET's statement *Towards an active labour market policy: Advice of the National Board of Employment, Education and Training and its Employment and Skills Formation Council*[86] may be noted. NBEET and its specialist advisory council, the Employment and Skills Formation Council (ESFC) were to play a significant role in developing a national industry training policy and the National Training Reform Agenda (NTRA). In 1992 the ESFC released a report, *The Australian vocational certificate training system* (the Carmichael report)[87] which proposed the consolidation of the various types of traineeship, apprenticeship and institutional-based training into a single system, with the aim of extending training to those who had not had an opportunity to participate in training, so that the Australian workforce would become more skilled and productive and consequently more internationally competitive. In 1993 it released a further report, *Raising the standard: Middlel level skills in the Australian workforce*,[88] which addressed the question of vocational education and skills formation at the middle levels of the ASF, that is at levels 4 to 6. This report recommended the integration of the employment related key competencies, advocated in the Mayer report, into middle level courses, and it also proposed future targets for participation of workers in their twenties in gaining middle level qualifications.

There was also considerable activity at Ministerial level. In 1990 a Ministerial Council of Vocational Education and Training (MOVEET), which met jointly with the AEC from 1991, and subsequently in 1993 became the Ministerial Council on Education, Employment, Training and Youth Affairs was established.[89] AEC/MOVEET was responsible for the production in 1991 of the Finn report,[90] which advocated the development of 'key areas of competence' in courses and set targets for youth participation and attainment in education and training; and in 1992, of the Mayer report,[91] which identified employment related competencies. Ministerial activity in the TAFE sector was concerned to attempt to negotiate a

national vision for post-compulsory education in the Ministerial endorsement of the Finn recommendations in 1991 and of the Carmichael report, *Australian vocational certificate training system* in 1992, as well as in the establishment of the National Training Board in 1991.[92] In 1992 MOVEET published the *Common and agreed national goals for vocational education*, a statement of the Commonwealth, State and Territory Ministers.[93] The Mission Statement proclaimed:

> *Australia's vocational education and training system aims to:*
>
> - *provide an educated, skilled and flexible workforce to enable Australian industry to be competitive in domestic and international markets*
> - *improve the knowledge, skills and quality of life for Australians, having regard to the particular needs of disadvantaged groups*
>
> *This Mission Statement will be fulfilled in co-operation with other education sectors, industry and those seeking vocational education and training.*[94]

However, there was no agreement to proceed with the recommendations of the Mayer report in 1993.[95]

The National Training Board established by MOVEET had introduced in 1991 the *National competency standards: Policy and guidelines*, which established the Australian Standards Framework in 1992.[96] Levels of productivity and skill were linked with wage structures, but the NTB also cautioned:

> *National Competency Standards, where appropriate, should relate to and be referred to in industrial awards or agreements determined by industrial tribunals. However, they should not be formally written into them.*[97]

The National Framework for the Recognition of Training (NFROT) was also endorsed by MOVEET in 1992. NFROT was to provide for the national accreditation of courses, the recognition of training programs, the registration of providers of training and certification of achievement under the national VET system. It was an agreement between State, Territory and Commonwealth governments which sought to ensure a consistent approach to the recognition of training, credit transfer and the accreditation of training across the nation. However, it was recognised during its development that it would have to be consonant with the ASF.[98]



The goal of these activities was to develop a national system for VET. The process involved State, Territory and Commonwealth collaboration at Ministerial level to gain agreement for the development of the various policies. This process worked, but it could not have the force and immediacy of a process firmly based in legislation. The Commonwealth was already providing some funding to the States and Territories for their TAFE sectors, and the further exercise of Commonwealth financial powers was an obvious way in which the Commonwealth could seek to increase its influence on the development of vocational education and training. In February 1992, the Prime Minister, the Hon. P J Keating, released *One Nation*,[99] a statement which described the Commonwealth Government's position on education, training and the labour

market. The Commonwealth Government offered to take full funding responsibility for the development of a new and expanded system of institutes of vocational education. The offer was not accepted by the States and Territories but by mid-1992 agreement had been reached to establish the Australian National Training Authority as a co-operative Commonwealth and State and Territory venture.[100] The stage was set for further legislative action.

The Australian National Training Authority was established under the *Australian National Training Authority Act 1992* and the *States Grants (TAFE Assistance) Act 1989* was subsequently amended by the passing of the *Vocational Education and Training Funding Act 1992*, which contained provision not only for the allocation of monies by the newly established Australian National Training Authority (ANTA), but also provisions relating to the funding of labour market programs such as the Australian Traineeship System, Career Start Traineeships and National Training Wage Traineeships. ANTA was established by s 5(1) of the *Australian National Training Authority Act 1992*. Under s 4(1) and the Schedule to the Act, the objectives and framework of the national system were to be set out in a statement drawn up with the agreement of the Commonwealth and the States and Territories. The ANTA Agreement identified the objectives, framework, key planning instruments, roles and responsibilities of main parties, the main decision-making processes and the funding arrangements. Provision was made in the Act for Ministerial Council of the Commonwealth, State and Territory Ministers responsible for vocational education and training (MINCO). Its functions were to oversee the work of the Authority and to decide strategic policy, national objectives and priorities. ANTA, the Commonwealth statutory authorities, advises not only as to funding, but also on the national strategic plan, which is to be implemented by the State and Territory training agencies within each jurisdiction. Sections 6 and 7 provided for consultation between ANTA and the State and Territory Training Authorities on matters such as the development of State and Territory profiles. These profiles are a set of specific State or Territory plans for the provision and support of VET in terms of course provision, other services and infrastructure, which are submitted to MINCO for approval. Section 9 required ANTA to consult with government and government bodies, industry advisory bodies and industry and employer and union organisations.



# 6 Conclusion

This historical overview has not been concerned to provide a critical historical account which provides an evaluation of how well particular policy and legislative initiatives have worked in practice. Indeed, it would not be possible within the scope of this project to undertake this task effectively. Rather, the focus of this historical overview has been the development of the legislative frameworks for vocational education and training in the States and Territories during the nineteenth and twentieth centuries and in the Commonwealth during

the second half of the twentieth century. After a very brief description of the key developments in the provision of vocational education and training in the nineteenth century Australian colonies, a general outline has been provided of the development of the regulation of vocational education and training in Australia during the twentieth century. Certain key elements of this development are worth highlighting.

The first element is that the particular stimuli which have focussed attention on the provision of technical education have changed over time, but the underlying theme has been the need to develop the national economy. Broadly speaking, it can be said that this has meant that the perceived policy functions of vocational education and training have changed over time. In the period up to the World War II the purpose of vocational education and training was the provision of trade training, both pre-vocational training in the schools and through apprenticeship, although in the major technical colleges there was also provision of higher level training at diploma level. In the period from the late 1940s to the early 1970s vocational education and training continued to be concerned with trade training and an increasing demand for higher level certificate and diploma training. In the early 1970s, however, another role emerged for vocational education and training. This was the function of providing training in an attempt to ameliorate unemployment, rising youth unemployment and the problems of particular groups, such as women and indigenous Australians, who were disadvantaged in the labour market. The provision of appropriate vocational education and training was seen also as a solution to the problem of skills shortages and skill obsolescence.

The second element which may be noted in the development of the regulatory framework was that of intervention by the State in the provision of vocational education and training. This occurred both in the regulation of the provision of educational institutions and in the regulation of apprenticeship. After the intervention of the State to provide free, compulsory and secular elementary schools in the Australian colonies during the second half of the nineteenth century, State intervention was extended to post-elementary, post-compulsory education, and this included the development of technical schools and senior technical colleges which provided pre-vocational technical education and trade and diploma training from the early decades of the twentieth century. Under the Australian constitutional framework, this regulatory intervention was the task of the States, and, in subsequent decades of the twentieth century, the Territories.

As far as the regulation of apprenticeship was concerned, there was State intervention in the Australian colonies during the nineteenth century. In the twentieth century there was not only further development of the apprenticeship legislation to take particular account of the nature and supervision of the practical and theoretical training of apprentices, but the regulatory control of apprenticeship was included in the industrial relations legislation of the States and Territories, and in the federal industrial relations jurisdiction through the

exercise of the Commonwealth's powers of conciliation and arbitration. Thus the regulation of apprentices' vocational education and training has been part of labour law in Australia during the twentieth century.

A further aspect of the intervention of the State in the regulation of vocational education and training has been the exercise of Commonwealth financial power to influence the development and implementation of national policies in education generally during the period after 1945. This development occurred initially in the higher education and school sectors, but from the 1970s the exercise of Commonwealth power in the vocational education and training sector has increased significantly, and consequential change to the federal legislative and administrative framework for vocational education and training occurred during this period. A particular catalyst for this growth was the need to attempt to resolve the problems of unemployment from the mid-1970s. Commonwealth policies of the 1980s were focussed on improving the skills of the Australian labour market, and the Commonwealth used not only its financial powers, but also its industrial relations powers, to develop practical consonance between vocational education and training and the formation and development of workplace skills.

A third element of the development of the Commonwealth legislative framework of vocational education and training, and in the relevant State and Territory frameworks has been the evolution of statutory structures to facilitate the co-operative development of a national training policy, and the use of Ministerial executive powers to implement agreed policies. The momentum in the vocational education and training sector has increased in the past decade with the development of the National Training Reform Agenda in the late 1980s, which led in 1992 to the ANTA Agreement and the formation of the Australian National Training Authority.

By 1992 the Commonwealth legislative framework was in place for the development and implementation of a national vocational education and training system, but although the establishment of this national statutory framework for the provision of TAFE and VET could be driven by the use of the Commonwealth's financial powers, the Commonwealth lacked constitutional authority to implement it unilaterally. Its successful implementation depended upon the co-operation of the State and Territory governments. As has been noted, legislative developments in the States and Territories tended not to occur simultaneously, but they did occur. New terms such as 'vocational education and training', and 'skills formation', and 'skill development', 'trainees', 'training agreements' and 'training contracts', which reflected the developing policy concepts, entered the lexicon of parliamentary draftsmen in the State and Territory jurisdictions as the legislation governing the administration and management of technical and further education and vocational training, and the legislation governing industry training, was revised during the 1980s and the early 1990s to enable the co-ordination of State, Territory and federal law.

However, to highlight the key features of the development of the statutory framework for vocational education and training leaves unanswered a further question: what is a national statutory framework in the Australian context? If a national statutory framework for the implementation of a particular policy requires the development of coincident Commonwealth and State and Territory 'mirror' or 'template' legislation, as for example, has occurred with the mutual recognition of goods and services in the Mutual Recognition legislation, or with the application of competition policy through the Competition Policy Reform legislation, then by this benchmark, there is no national statutory framework for the provision of VET. The distinctive traditions of each of the States and Territories influenced the statutory provision for the regulation of VET, and the statutory provisions, although similar, were not coincident. Equally, if the development of a national statutory framework for VET required that the Commonwealth should assume responsibility for VET, and pass national VET legislation, then this benchmark was also not met by the legislation in place in the early 1990s. There simply was no movement, political or otherwise, for the States and Territories to hand their education power over to the Commonwealth to enable national education legislation, including legislation for TAFE and vocational education and higher education, to be developed.

Given these circumstances, it is arguable that the best gloss which can be placed on the Commonwealth, State and Territory legislation relating to vocational education and training, as it had developed by 1992, is to characterise it as constituting for most practical purposes a statutory framework which was as close to a national statutory framework as the Australian federal system was realistically likely to develop in the short and medium term future. Further, although much of the development of the statutory framework of the early 1990s was driven by the Commonwealth's exercise of its financial powers, and there had been a considerable increase in Commonwealth funding for TAFE and VET, the States and Territories continued to provide most of the public funding.[101] Consequently, it remained likely that the States and Territories would continue to be concerned that national policy goals were consistent with the policy goals of individual State and Territory governments.



In a review of the developments of the 1980s and early 1990s some commentators have noted:

> *The shift from AEC to AEC/MOVEET to MCEETYA is a consequence of the new federalisms at work in education against a backdrop of efforts to revamp federalism generally. Across the Hawke/Keating periods, there has been an increasing ministerialisation of policy processes concomitant with these changes. We note, at State and Federal levels, the shift in authority in real terms from bureaucrats, CEOs and Directors-General to Ministers; the related shift from secretariats, ministries and departments to Ministers and the political apparatus; the policy and funding shift from single programs . . . to broadbanding; the whole push to rationalise secretariats, sub-committees and agencies; in short, the political and economic drive to streamline and steer the executive process. There is another component of this ministerialisation,*

*namely the way in which SPC (Special Premiers' Conferences) and COAG (the Council of Australian Governments) decisions have framed the policy development role, first of the AEC and subsequently of MCEETYA.*[102]

Such a shift to ministerialisation is of course well within the executive powers and discretions which legislation, both State and federal, allows to the Minister responsible for its administration. If it remains the case that a national legislative framework for VET remains unlikely to be achieved, then the exercise of executive powers and discretions will probably continue to constitute the best means available to the Commonwealth and State and Territory governments for the development of national policies. It may also be noted that the exercise of Ministerial powers is used in fields other than education, for example, in the definition of national health funding policies.

As to the issue of whether or not a national training policy has been achieved, the developments to date of nationally consistent policy in aspects of the provision of VET through the training agreements and other collaborative endeavours of the Commonwealth and the States and the Territories do suggest that a broad national policy framework can be said to be in place. Writing in 1996 one contemporary commentator pointed out:

> *The history of the National Training Reform Agenda is yet to be written. But it is obvious from the plethora of working parties, committees and councils that the agenda was at least partially an outcome of the corporatist and supply side intervention of the Commonwealth Government and a most substantial challenge to the federalist settlement in Australian education. The effectiveness of this intervention in terms of the Australian training system is hard to gauge. The labryinth of the system is also a symptom of its partially successful challenge of the settlement. Despite the change of Federal Government and the array of conservative State governments, the concept of the national training system has remained intact, even if it is to be remodelled upon a deregulated labour market. The ANTA agreement has been extended and the Federal Government has assumed a major stake in VET in Australia.*[103]

And perhaps the following opinion, published in 1990, provides a useful final reflection:

> *I want to argue that that common vision, while it may be an ideal position, is an extremely difficult position to establish in the real world because perceptions and priorities change. They change over time and they don't change symphonously in every State, so we have to deal with a legislative structure where although we might require a single program, a co-ordinated program of action, different States will be more or less enthusiastic about pursuing it over the course of even a short-term program. It will then be very difficult to maintain the same uniform level of commitment to those activities. And if you don't maintain a uniform level of commitment one or other State gets ahead of another and arguments of balance then begin to emerge.*
>
> *The more usual position is one where priorities conflict. I want to use that term conflict, not in the sense that priorities are mutually exclusive, that they're inherently opposed, but that they are not synchronous or that they are not entirely congruent.*

*That is to say, the priorities of the States and Commonwealth don't necessarily coincide, or they may coincide but be out of phase. Both the States and the Commonwealth are necessarily involved in most employment and education areas; the Commonwealth because major program in service areas like education and employment training programs require vast injections of money and that comes from the Commonwealth; the States because of constitutional and legislative responsibilities in those areas. The question of national balance becomes the crucial one.*[104]

Given the nature of Australian federalism, it was likely that these issues would remain live ones during the further development of a nationally consistent training policy after 1992. It was also likely that they would be reflected in any further development of the federal and State and Territory legislative frameworks which would be required during the 1990s in response to the evolving National Training Policy.

# Endnotes

* Smeaton, T H 1927, *Education in South Australia from 1836 to 1927*, Rigby Ltd, Adelaide, pp.95,102.

** Commonwealth 1988–89, 1988, Budget related paper no.9, *Labour market reform: The industrial relations agenda*, circulated by the Hon. R. Willis, M.P., Minister for Industrial Relations and Minister Assisting the Prime Minister for Public Service Matters, AGPS, Canberra, p.5.

1 See Murray-Smith, S 1966, 'A history of technical education in Australia with special reference to the period before 1914,' PhD thesis, University of Melbourne, (hereinafter referred to as Murray-Smith, thesis, 1966) *passim*; see also Shorten, A R 1976, 'Imperial validity and maritime education in Australia, 1869–1923,' Ph D thesis, Monash University, pp.360–409, (hereinafter referred to as Shorten, thesis, 1976) for an account of apprenticeship to the sea service in the Australian colonies.

2 Murray-Smith, thesis, 1966, p.77; see also Noble, J 1973, *Port Phillip: Pilots and defences*, Hawthorn Press, Melbourne, pp.9–10.

3 Murray-Smith, thesis, 1966, pp.218–219.

4 Shorten, thesis, 1976, pp.555–556. For an account of the role of examinations in the development of professional training in Victoria, see Clements, M A 1974, 'The co-ordination of professional training in Victoria, 1895–1905,' M Ed thesis, University of Melbourne, (hereinafter referred to as Clements, thesis, 1974).

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29 Ibid., pp.174–202.

30 Ibid., p.207.

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# Literature survey

## 1 Introduction

THE UNDERLYING PREMISE of this project was that there has been a lack of research and analysis of the *legal* framework and incidents of vocational education and training in Australia. The areas in which it might be expected that legal regulation would appear in vocational education and training would include the establishment of an institutional structure for the implementation of State policy, the establishment of goals, and methods for achieving them, the formulation of rights and duties and responsibilities on the part of the players in the system, and the creation of rights and entitlements on the part of the beneficiaries of the system. All of these types of issues, among others, one would anticipate to arise in legal analysis of the vocational education and training subject. Yet, as this literature survey demonstrates, there has been very little systematic coverage of any of these areas by legal scholars and commentators.



Prior to looking more closely at the scope of what little has been done, some explanation for this omission seems warranted. Generally speaking, training and education has never been a discrete area of focus within a law degree or other program of legal training. Institutions offering degrees and programs in education itself have from time to time housed legal sections, sometimes quite large. However, the focus of scholarship and applied work undertaken within these organisations has tended to be on the operation of law on educational institutions. Thus, the key aspects of the regulatory system sustaining vocational education and training has lacked for attention in this quarter.

Education law, as an area of specialised academic pursuit reaching beyond education faculties and departments is in its infancy in Australia. The Australia and New Zealand Education Law Association (ANZELA) (Inc) was formally established only as recently as 1991 and incorporated early in 1992. It has active Chapters in New South Wales, Queensland and Victoria, and holds annual

conferences to promote and disseminate research into the field of education and the law. Chapter newsletters are published for members, and since 1996 the *Australia and New Zealand Journal of Law and Education* has also been published. Within this organisation, the major areas of inquiry have engaged with anti-discrimination, copyright, trade practices and children's rights. To emphasise the point again, the legal basis of vocational education and training has not been a major topic of research or discussion.

The field of education and the law in Australia has grown since the 1970s. Since the publication of the seminal study of the constitutional context of education, I K F Birch, *Constitutional responsibility for education in Australia*, in 1975, and the initial publications on law in schools, Birch, *The school and the law*, 1976 and Knott, Tronc and Middleton, *Australian schools and the law: Principal, teacher and student*, in 1977, the number of published texts in the area has grown, particularly in the 1980s and 1990s.[1] However, in general, these texts have been concerned with the practical implications of the impact of statute law and common law on school operations, and have included at best only fairly brief reference to the higher education and TAFE and vocational education and training sectors.

A second genre of writing in the field of education and the law has been the taxonomic approach used in the legal encyclopaedias published by Butterworths. In 1992, the *Australian commentary on Halsbury's laws of Australia*,[2] was published but this was superseded in 1994 by the *Education and research* title in *Halsbury's laws of Australia*.[3] In this genre, the law relating to TAFE and vocational education and training has been surveyed in some detail.

The third source of commentary on Australian education and the law has been the publication of academic research. Some seminal articles have been published in academic journals, not infrequently on the topic of educational negligence.[4] The *Australia and New Zealand Journal of Law and Education* in its first and second volumes has included articles dealing with the history of the legal context of Australian education, exclusion from school, critiques of the operation of discrimination law in educational institutions, the mandatory reporting of child abuse, and principals' knowledge of the law affecting schools.[5]



Since 1991, the published proceedings of the ANZELA (Inc) conferences have provided yet another source of commentary. These papers have covered a variety of issues dealing with the operational impact of the law on educational activities. An indicative list based on the published proceedings of the Fourth and Fifth Annual Conferences held in 1995 and 1996 includes: educational negligence, educational malpractice, industrial relations law, discrimination law, freedom of information legislation, ombudsman legislation, the education of children with special needs, children's rights, family law and the school, school discipline, health and safety law in schools, the mandatory reporting of child abuse obligations, developments in school education legislation, teacher evaluation and appraisal, professional standards in teaching, and aspects of legal risk

management in education.[6] It has only been in 1996 and 1997 that some of the ANZELA conference papers have dealt with the VET sector and the law.[7]

The main point which must be made, is that the writing in the field of Australian education and the law is in its infancy, and concerned with taxonomic research and with commentary on practical operational issues. To date, there has been no sustained critical review of the laws relating to the various education sectors, and therefore, there are only limited materials from this field which are relevant to the literature survey for this project.

The other area of legal specialisation within which issues concerning training and education might have been expected to arise is in subjects dealing with the roles and functions of labour markets. The main specialisation here is labour law, a subject which emerged as a conceptual field of study in law only in the early 1950s. For various reasons, however, labour law has failed to take training and education within labour markets as an important part of its field of activity. The principal reason why this is so is because labour law begins its examination at the point of the engagement of labour (i.e. with the formation of the employment relationship) rather than with the regulation of the labour market external to enterprises. Thus, issues which pertain to the preparation of labour for employment, and matters which affect the flexibility and segmentation of labour markets, are almost entirely ignored by academic researchers and commentators in Australian labour law.[8]

It follows from the above discussion, about the focus of labour law, that it is the actual employment-connected aspects of vocational education and training which are most likely to be covered within a labour law subject delivered at a tertiary level. Thus it is the case that to the extent that there is any treatment of vocational education and training as an issue, it tends to occur in respect of apprenticeship, and the duties, rights and conditions within the contract of employment which accompanies the contract of apprenticeship. Again, however, labour law has not tended to explore these issues in any detail. The reason for this is that labour law as a subject has been constructed as a study of the most 'typical' type of employment, focussing on the concept of the full-time male adult worker. The diversity of labour market behaviours, and thus the employment of persons under different ('atypical') types of contracts and in different circumstances, whilst not entirely ignored, have been largely marginalised in the discussion, at least until recently. Apprentices and trainees in employment fell into these 'atypical' categories.



To sum up, we found in this survey of vocational education and training literature, more or less what we expected to be the case. There is no major field of academic research and analysis which has supported a thorough examination of the legal regulation of vocational education and training. On the other hand, however, both in the field of labour law and education law, vocational education and training is an emerging concern. As a result of the absence of research, description and analysis, we surmised that policy makers, the constituent groups

involved in vocational education and training, and academics working in this field would benefit from a project meeting some of these needs. This research report was formulated in an attempt to overcome this gap in legal knowledge.

## 2 The approach in this survey

The aim of this project was to provide a comprehensive statement and analysis of the law and policy of vocational education and training in Australia, and its relationship with the regulation of the Australian labour market. Its central objective was to provide a systematic classification, analysis and evaluation of the law relating to the provision of vocational education in Australia. The more specific objectives were to classify the existing body of laws according to their purposes; to analyse their provisions; to analyse how these laws are responding to changes in labour market conditions; to examine the link between these laws and the policies to which they give rise; and to identify any inconsistencies, irregularities and gaps, both between and within jurisdictions. In other words, the objectives of the research were concerned with the examination of vocational education and training in Australia from the particular perspective of its legal form.

To achieve the objectives of the research, that is, to define what vocational education and training is in legal and policy terms, to describe the legal status of the public institutions and the private bodies which provide vocational education and training, to describe how vocational education and training, as a matter of law and policy, is distinguished from other education sectors, and, to describe the legal ordering of the organisation and delivery of vocational education and training, the research has relied upon the text of the law and the text of the policy. The textual material has been analysed and this constitutes the basis of this report. However, the report also includes the supplementary assessment of the material in light of the views of experienced administrators in the vocational education and training sector.

Ideally, this literature survey would have been able to cast some light on the legal, institutional and policy factors and how they measured up against the regulatory standards of consistency, implementation, completeness, rationality and transparency. In general, it does not do this. The key reason for this was explained in the introduction to this chapter, that is, there is a paucity of legal commentary in the area of vocational education and training. As a logical consequence, most of the extant commentary on policy development is written from the perspectives of non-legal disciplines, notably economics, industrial relations and education. Given the purpose and scope of this project, only a brief indicative commentary on the economic and industrial relations literature is included in this survey. However, some commentary by academics, administrators and educators does help to identify those policy areas which are, at least to some extent, problematic in their implementation. Critiques of some

specific issues in training reform are, therefore, noted. However, it must be stressed, again, that this project is not concerned with the evaluation of operational issues relating to the efficiency of the delivery of vocational education and training, or the efficiency of its objectives. The major concern of this project is the order of the regulatory scheme for vocational education and training, and hence these particular issues have been noted only because of their value in highlighting aspects of the scheme's implementation.

A further preliminary issue is the temporal scope of the literature survey. Given that the Australian National Training Authority (ANTA) was established in 1992, and began its work as a statutory authority in 1993, and that the complementary legislative changes in the States and Territories were also not passed until this time, it was decided that the survey would deal chiefly with materials published from 1993–1996. It was not a surprising discovery that much commentary published from 1993–1996 related to reform of the vocational education and training system and the development of a number of policies which became known as the National Training Reform Agenda (NTRA). The legislative changes of the early 1990s were intended to facilitate the implementation of the NTRA.

At the February 1996 federal election, there was a change of government. The Labor Government which had overseen major reforms in the vocational education and training sector during the decade from 1985–1995 was replaced by a Liberal/National Coalition Party Government. The incoming government has made further changes to the vocational education and training system. These changes were introduced whilst the research for this project was being undertaken. At a 'Landmark Ministerial Council Meeting' of ANTA on 23 May 1997, the Ministers endorsed the framework for a new National Strategy and identified the Annual National Priorities for 1998 as:

- implementation of New Apprenticeships, including user choice
- expansion of market mechanisms
- implementation of National Training Framework
- provision of greater opportunities and improved outcomes for under-represented clients
- value for public expenditure maximised
- achieving training outcomes which meet the needs of small business
- encouragement of a training culture within industry, including enhanced training of the existing workforce
- training to facilitate State/Territory development[9]

The National Training Framework (NTF) has two interconnected features: the Australian Recognition Framework (ARF) which sets minimum requirements for the registration of training organisations and mutual recognition[10] which was expected to replace the National Framework for the Recognition of Training (NFROT);[11] and, Training Packages which were expected to integrate competency

standards and assessment arrangements.[12] The New Apprenticeships would commence on 1 January 1998, and user choice would be a central element of the New Apprenticeships.[13] Given the timeframe for the introduction of these changes, it was unlikely that significant commentary would be available for inclusion in this literature survey. Consequently, it was decided that any comment on contemporary policy would be reviewed in the following chapter which covers the analysis of current policy.

# 3 Methodology

## 3.1 Sources

This literature survey has been developed from searches of education, legal, general and university databases, and other sources. Educational databases searched were the Australian Education Index (AEI), the dedicated Vocational Education Index (VOCED), and the broadly-based Education Research Inquiry Catalogue (ERIC). Legal databases searched were the Australasian Legal Literature Index (ALLI), the Index to Legal Periodicals (ILP) and LegalTrac. Searches of Econlit and WORKLIT, which covered economics and industrial relations materials were also undertaken. The Attorney-Generals Information Service (AGIS) and the Australian Pubiic Affairs Information Service (APAIS) databases, the standard databases for the University of Melbourne (INNOPPAC) and Monash University (SESAME), and the Index to United Nations Documents 1976–1995 were also searched. Further, the papers and proceedings from conferences conducted by the National Centre for Vocational Educational Research Ltd (NCVER), Monash University–ACER Centre for the Economics of Education and Training (CEET), the Australian National Training Authority (ANTA), the Victorian Office of Training and Further Education (OTFE), and the Australia and New Zealand Education Law Association (Inc) (ANZELA), which are not necessarily recorded in the standard databases were also investigated. Vocational education and training journals such as the *Australian Training Review* which is published by the NCVER, *Australian Training*, which is published by ANTA, and the *Australian TAFE Teacher*, which is published by the Australian Education Union were also searched. Finally, it should be noted that at least two conferences were conducted during 1997 which may have contributed to this literature survey, however, at this time, published papers are unavailable.[14]

## 3.2 Search terms

In choosing search terms to be used, the chief objective was to capture materials relevant to a project on vocational education and training policy and law. According to the requirements of the particular database, the search terms included the following: apprenticeship law; vocational education; vocational law; vocational policy; vocational education and law; vocational training; vocational training and law; vocational training and labour markets; vocational training law;

training policy; vocational training policy; vocationalism; occupational training; occupational training law; occupational training and law; occupational training and labour market; technical education; trade schools; proprietary schools; community colleges; industrial relations law and training; vocational training and industrial relations; labour law; labour market; labour market law; labour market policy; labour market regulation; labour market training; labour market training law; labour market training policy; labour market programs and training; labour market reform and training; and, finally, training reform agenda.

## 3.3 Selection of material for inclusion

A further methodological issue was the criteria upon which materials were to be included in the report of the literature survey. That these materials provided some evaluative commentary was one criterion, and that their subject matter related to the core policy issues was a second criterion. Some items in the literature were policy statements prepared by governmental authorities of the Commonwealth, State and Territories. These materials have not been included in this survey, and indeed, many of them are now essentially of historical interest only. Other items in the literature which were evaluative in their findings were carried out or commissioned by those same governmental bodies. To the extent that these studies concerned what seemed to us to be core issues arising from the policy relating to the development of a national training system, they have been included in this survey.

## 3.4 Terminology

One final note of caution is necessary. We have already noted that the vocational education and training system has undergone significant changes in recent years. One consequence of this are changes in the terminology. What has been commonly referred to as the National Training Reform Agenda (NTRA), has also been referred to as the 'Training Reform Agenda' (TRA) and 'VET Reform'. To avoid confusion within the content of this survey, the general term 'training reform' will be used to refer to the changes which have occurred in the vocational education and training system. However, within commentary on individual studies, terms used by the author will be retained.

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# 4 Research in VET generally

We have noted the relative lack of research into the regulatory framework and legal incidents of the vocational education and training area. In addition, we should also note surveys which have evaluated the scope and nature of the literature on vocational education and training. For example, in developing proposals for a research and development strategy for vocational education and training in Australia McDonald, Hayton, Gonczi & Hager (1992)[15] searched the AEI from 1979 for vocational education and training articles using the seven

major subject categories of policy and economics, organisation, industry issues, students and trainees, teachers and trainers, curriculum and research methods. They found 974 articles on vocational education and training which was ten per cent of the total number of research articles on education and concluded that only about half as much was spent on research in VET, as a proportion of recurrent expenditure, as on research in other categories of education.

In addition to searching the AEI, the authors also searched the VOCED database for 1991–1992, Australian universities, and major government research funding agencies and failed to find a single research project relating to the field of 'policy and economics' in vocational education and training.[16] Whilst acknowledging that the sources used in their search may not provide a complete picture of Australian research in the field,[17] the authors concluded that there was no strong critique of VET policies and programs[18] and that:

> *Overall, we know very little about the factors that drive vocational education and training policy, its intellectual basis, its relationship with other government policy, and how effectively it achieved its aims.*[19]

Guerin (1993)[20] noted the limitations of research available to support contemporary initiatives in VET, finding that vocational education was a neglected area for research with an absence of policy related research in relation to the design and delivery of VET. Butterworth (1994)[21] searched the AEI and APAIS from 1988 to June 1993. He concluded that there was very little private sector research published, research publications from authors in the training/employment sector (not university or TAFE) were sparse, research on students and curriculum was a major focus of TAFE research, that there was a dearth of research on administration/management, resourcing, planning, national policy and system, and that recent years had seen a decrease in general evaluative research. Finally, ACOSS (1996),[22] noted that most literature could be classified as 'broad VET sector and government policy documents' and 'evaluation of specific [labour market programs] or local community evaluations of government provisions of [labour market programs] for unemployed people', and the authors concluded:

> *In summary, the literature review uncovered more questions than it answered. After two recessions, and in spite of the fact that unemployment has touched most members of the community in some way, there is a bewildering lack of attention to analysing how the two sides of the 'training continuum'—training and training related [labour market programs] for unemployed people and formal VET—intersect.*[23]

Despite the observations of the authors cited above, it must be noted that there has been an increasing momentum for the development of national strategies for the promotion of research in the VET sector in recent years. For example, in 1994, the Australian National Training Authority Research Advisory Council (ANTARAC) identified five priorities for VET research[24] and in the same year conducted the Research Priorities in Vocational Education and Training Conference.[25] The Australian National Training Authority also funds four key

research centres to conduct research into vocational education and training.[26]

Other examples of the growing concern for the continuing development of research in vocational education and training may be noted. In Victoria, the first Office of Technical and Further Education Conference was held in Melbourne in 1994.[27] At this conference, Sweet (1994) pointed out what he considered to be *limitations in some vocational education and training research*:

> *What scholarly and research community there is in vocational education and training appears to behave largely as a client of government agendas rather than to adopt the traditional responsibilities of the academic.*[28]

He considered that the 'tone of commentary from educational academics appeared carping, negative and resistant, hostile to any presumption that education should relate to employment' and 'as a consequence of the bulk of Australian education academics and researchers distancing themselves from the issues of the day has been an intellectual weakening in the national reform agenda'.[29]

Finally, it may be noted that, in 1997, the National Research and Evaluation Committee on behalf of ANTA released The National Research and Evaluation Strategy for Vocational Education and Training in Australia, 1997–2000.[30]

# 5 The legislative and regulatory framework

The reasons for the paucity of legal research in the vocational education and training field were noted above. It is only recently that some commentary on vocational education and training and the law has begun to emerge, generally from members of the legal profession with experience either as corporate counsel in education or from the private profession, and from some academic commentators. There is also some commentary on the impact of law on TAFE institutions which has been written within the context of descriptions of education and the law, a field of study which to date has produced studies which have used either a taxonomic approach which attempts to describe the legislation relating to vocational education and training, or an operational issues approach which deals with practical issues which arise for TAFE institutions and providers of vocational education and training from laws of general applicability in the community at large. Generally speaking this commentary has been concerned to describe legal issues and to inform educators and administrators in the TAFE sector of the impact of law upon their work.



## 5.1 Legal and industrial relations commentary

For the most part, the limited textual coverage identified in this area has dealt with aspects of industrial relations laws relating to apprenticeships and traineeships, or practical legal issues which have arisen in TAFE institutions.

Historically, Australian labour law texts have dealt, even to some considerable degree, with the question of apprentices in enterprise regulation.[31] In these texts, the analysis was upon the conditions of work of apprentices under the award system, and the way industrial tribunals regulated the patterns of junior and apprentice employment within workplaces. To a lesser extent, this approach was followed in the wave of contemporary texts which began in the late 1970s.[32] Other mainstream labour law texts have no entry under apprenticeship or training in their index.[33] Of all modern labour law texts, only Creighton and Stewart (1994)[34] have dealt directly with the *Training Guarantee Act 1990* and other aspects of the training agenda, and attempted to fit these into the scope of labour law generally. Their text also attempts to position the contract of apprenticeship as belonging to an 'atypical' class of work relationship.

Several other contributions from the 'labour' field have come from industrial relations scholars who are interested in the legal framework for the regulation of vocational education and training.[35] These commentaries generally cover the statutory basis of apprenticeship, including procedures for dispute resolution, but also include material relating to changes in apprenticeship as a result of award restructuring and the application of the Structural Efficiency Principle (SEP) in the late 1980s, and to labour markets and skill formation.

The non-labour oriented commentary dealing with practical legal issues which have arisen in TAFE institutions has concerned the operation of ombudsman legislation, Jacobsen (1994),[36] and the application of anti-discrimination legislation, Shorten (1995).[37] Generally speaking, this and other material has not pertained to the regulatory framework of vocational education and training and its institutions in any systematic sense.

There are some exceptions however. Lundberg (1994)[38] has suggested that:

> *Competency-based training, NFROT, competency-based assessment, some general equity principles and appropriate implementation machinery could be given Commonwealth legislative effect on a national basis through the enactment into law of the UNESCO Convention on Technical and Vocational Education, which has been ratified by Australia.*
>
> *This could be done in the form of umbrella legislation which devolved implementation arrangements to appropriate bodies established under State and Territory law, but with the national co-ordinating body being given a stronger national legislative basis for its role. Such an arrangement would give effect across the country to arrangements which have been put in place by painstaking consensus, only to be vulnerable to disruption by executive fiat of any executive government in any major State.*[39]

Best (1996)[40] provided a critique of the application of the legislative matrix of competition law to the activities of VET providers. He explored issues relating to government agencies from competition law and from corporations law and described the tests arising from judicial decisions relating to what constitutes 'carrying on a business'.[41] The final section of the paper discusses the nature of

the vocational education and training market in the context on the legislative definition in the (Cwth) *Trade Practices Act 1974* s 4E.

In summary, only the commentary in labour law and industrial relations texts was concerned with laws which relates to the legislation directly concerned to regulate vocational education and training. The other extant commentary was concerned with laws of general application beyond the vocational sector, and did not deal with the law relating directly to vocational education and training. However, there is commentary in other fields of analysis which deals with the legal, institutional and policy factors in this sector, and how they measured up against the regulatory standards of consistency, implementation, completeness, rationality and transparency.

## 5.2 General commentary on the regulatory and policy framework

It was noted above that McDonald et al. (1992) found little evidence of research into the economics of vocational education and training.[42] However, there has been an increasing amount of research in this area, and the Australian National Training Authority funds the Centre for the Economics of Education and Training which is located at Monash University. Only a very brief indicative account of this research is included here.

Ferrier and Selby Smith (1995)[43] provided a significant example of the breadth and depth of this research. Several papers in this publication dealt with aspects of the economics of investment in vocational education and training.[44] Other examples include Anderson (1995)[45] who dealt with the need for further research on the development of an open training market as a key policy aspect of the development of the national training system, Ferrier (1995)[46] who dealt with the implementation of equity policy, and Maglen and Selby Smith (1995)[47] who examined the organisation and funding of TAFE in New South Wales in relation to the economic issues involved, and examined some options which are open to governments for funding policy of vocational education and training. In reviewing economic rationalism, Anderson (1996) concluded that 'causal connections between training, productivity and earnings have been assumed rather than proven by economists of education who rely on human capital theory'.[48] He stated that:

> *. . . the market has . . . become the dominant paradigm for defining the terms of policy debate and shaping the framework of government decisions concerning policy priorities, program delivery and resource allocation in the VET sectors.*[49]

In applying public interest theory and public choice theory, Sloan (1995)[50] described the NTRA as a complex web of regulatory arrangements involving both State and federal agencies and now centred on ANTA.[51] She found that '[as] far as the NTRA is concerned, it is very clear that a 'powerful coalition of interest groups' had been responsible for the strategy as a whole and its component parts

and skill-based career paths written into awards would provide alternative means of delivering real wage increases to the trade unionists',[52] and governments have favoured the NTRA, 'not the least to demonstrate their concern for young people and the unemployed'.[53] There had also 'been ongoing rivalry between the federal and State levels of bureaucracy'.[54] However, in Sloan's view 'Even State governments which may have been suspicious of some of the premises and assumptions underpinning the NTRA [had] opted to support the processes because of the lure of the large sums of additional Commonwealth funds given over to the NTRA'.[55]

A number of authors have characterised the nature of training reform. These include the following descriptions: a 'bureaucratic juggernaut';[56] a complex and ambitious program for reforming Australia's industry training system;[57] the boldest most comprehensive approach to training reform ever attempted in Australia;[58] a number of disparate policies some of which are seemingly illogical;[59] a set of elements which 'do not represent a complete overall strategy but rather a loosely connected set of relevant policies';[60] and, 'a complex web of regulatory arrangements involving both State and federal agencies, now centred around the ANTA'.[61] In 1996, a report of the National Board of Employment, Education and Training and the Employment and Skills Formation Council concluded that the rhetoric of *Working Nation* and the *National strategy of vocational education and training* 'had run well ahead of the capacity of the bureaucracy, the training sector and industry to deliver, thus creating a gap between design and reality'.[62]

It may also be noted that the Australian National Training Authority has been described as 'a new level of government sitting between the Commonwealth and the States'[63] which seemed to be a description of one view of the relationship between the Authority and the State and Territory training authorities rather than a comment on the legal status of ANTA.

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Others have commented on the concept of the training market. For example, in referring to problems which might arise in the development of the concept, Curtain (1994) stated:

> *The top-down, centrally driven nature of the reforms with emphasis on national consistency and national frameworks for the recognition of skills also reflect the effects of a supply-side dominance of the reform agenda.*[64]

He considered, however, the attention should also be focussed on the demand side of the training market. Sloan (1994) indicated that the fundamental flaw in the training reform agenda was 'a lack of appreciation of why training markets fail and how these imperfections can be remedied'.[65] The Allen Consulting Group (1994) argued that there was a need to refocus on the demand side.[66]

Yet other economists have examined aspects of labour market policy. Boreham, Roan & Whitehouse (1994) noted that since the early 1990s in Australia, shifts in labour market policy in the interests of productive efficiency had

produced a policy mix incorporating elements of both active labour market policy and privatisation—all within a commitment to social justice which seeks to ensure equal access for all to employment, education and training.[67]

They also examined the role of the CES and the privatisation of employment services.[68]

Finally, the views of Ryan (1995)[69] suggested that 'an important reason for market failure in VET is a range of distortions in the labour market, to which the VET market is inextricably linked', and described industrial relations as the 'ghost in the machine of the training reform agenda'.[70]

It will be seen from the foregoing that the scholarly literature in vocational education and training is fragmented and very patchy in parts. To the extent that there has been some reasonably extensive coverage and evaluation of vocational education and training it has occurred in works based in fields of study other than law. These analyses, however, are not within the general competencies of the authors of this report to discuss and beyond noting the existence of the body of this work, it is not necessary for our purposes to explore it in further detail.

# 6 Policy making in VET

In reviewing patterns of post-compulsory education in the 1890s, 1930s and the 1980/90s, White (1995)[71] compared these periods of depression or recession and explored the policy themes which he considered characterised these years concluding that official debate on policy relating education to the economy has occurred with an almost total absence of historical perspective.

Other authors have commented, in a general sense, on training reform and the role of research in the development of policy. For example, Butterworth (1994) considered that new developments in the vocational education and training sector had occurred largely in a research vacuum.[72] A possible explanation for this is provided by Wiltshire (1993) who had stated earlier, that there 'is a clear dichotomy between the nature of research and the nature of policy making'.[73] He suggested that this is further complicated by recent trends to internationalisation or globalisation and the national approach to policy making which had tended to increase the roles and power of central agencies in Commonwealth, State and Territory governments, which had changed the bureaucracy from 'responsible' to 'responsive', and caused role confusion between the Ministers, departments and independent statutory bodies.

Some authors have also commented on the underpinning assumptions which have driven training reform. For example Dudley and Vidovich (1995)[74] considered that the economic rationalism and corporate managerialism of training reform had narrowed the education policy agenda to issues of economic efficiency, economic productivity and institutional competitiveness at the expense of concerns such as personal development, democratic citizenship, equality and

social justice. Stevenson (1993)[75] outlined and examined underlying assumptions of essential aspects of the government skills formation policies and argued that policies were bound on outdated economic goals and technicist views of education and knowledge.

Finally, a report on vocational education and training policy and research presented to the Office of Training and Further Education in December 1997[76] argued that much vocational education and training research is influenced by the researchers ideological and theoretical biases and that much VET research lacked a valid empirical base. The authors concluded that research activity is often post-event funded to validate or evaluate policy initiatives which have already been implemented. They contended that there needed to be more use of research in policy formation to embed policy formulation in the VET environment.[77]

A second group of works have attempted to examine the significance for vocational education and training policy, of the change of government following the 1996 federal election.

In reviewing the status of the TAFE sector at the change of federal government, Kell and Anderson (1996)[78] suggested that a key issue for the TAFE sector was the distribution of funding by ANTA through competitive tendering. They were critical of the move to privatisation, of the casualisation of TAFE teaching positions, of the difficulties of engaging in long-term planning, and of the limited success experienced by the TAFE systems in attempts at commercialisation. Suggestions were made as to the nature of responses to challenges facing the incoming federal government including some difficult choices and decisions if they were to maintain the momentum of reform and produce a highly skilled workforce. They promoted renovating TAFE, linking it back to local community needs and making it more responsive and accountable to individual clients as essential. They also indicated that greater attention needed to be paid to promoting long-term planning, resource stability, infrastructure development, program diversity and quality, and teacher development. New ways to stimulate industry investment in training and to generate an enterprise-level training culture were also needed.



Lundberg (1996)[79] investigated the views of directors and heads of school or equivalent in Australian TAFE institutes and colleges to identify how the training reform agenda had impacted on their management responsibilities. He concluded that competency-based training and assessment was progressing more slowly than Ministers might have hoped, much remained to be done (at the time of survey) in the implementation of the Australian Certificate Vocational Training System (ACVTS) and the same issues would confront the implementation of the Federal Government's Modern Australian Apprenticeship and Traineeship System (MAATS). Flexible delivery was making limited progress, National Framework for the Recognition of Training (NFROT) had impacted substantially on managers responsibilities and workloads, senior management was more favourably disposed towards competition and a more open training market than

middle level managers. Lundberg considered that coalition policies were likely to be welcomed by many senior managers. There was a substantial level of practical provision to support disadvantaged clients in TAFE but there was a strong perception among many respondents that there existed an unresolved tension between market oriented funding and TAFE's social obligations. All key elements of the training reform agenda were regarded by many respondents as positive influences on quality. He found useful quantitative indications of the rather uneven state of progress in the implementation of the training reform agenda.

# 7 The link between industrial relations and VET

In 1988, *A changing workforce* contended that training took place in an industrial relations framework, and in the same year *Labour market reform: An industrial relations agenda* contended that industrial relations and vocational education occurred in parallel. This is an issue which has been reviewed by a number of authors. For example, Knox and Pickersgill (1993) cited a speech by Murphy (c 1991) which described the Training Reform Agenda as:

> *. . . the collection of policies developed in conjunction with industry and award restructuring to support skills formation processes intended to underpin the linkage between skills and productivity.*[50]

Gonczi and Hager (1992)[51] identified the key drivers of training reform as industrial reform, the link between vocational education and training, workplace reform and reform of industrial awards, and the role of vocational education and training and its relationship with national goals (especially in relation to the economy). Bryce (1995) contended that wage outcomes associated with award restructuring demonstrated a linkage between skill recognition and training.[52] She continued:

> *The stated linkages between economic performance, structural adjustment, award and industry restructuring and skill formation practices provide much of the context to the debates about education reforms. It is, therefore, impossible for educators to ignore the broad industrial context within which education and training is taking place. This is unfamiliar territory and a significant challenge for educators, but it is not an issue that can be avoided. It is this explicit linkage at a policy level between the needs and demands of employment in an industrial relations sense which, I would suggest, gives what we have come to understand as the Training Reform Agenda its particular flavour.*[53]

Hall (1995)[54] linked training reform to award restructuring and the need for structural efficiency in the early 1980s, to improving the nation's competitiveness, followed by the need to improve the nation's vocational education and training system, and then solving unemployment. He considered that although the rationale had changed, the overall intent of increasing the responsiveness of vocational education and training to industry's needs had remained constant.

Sloan (1995)[85] described the national training reform agenda (NTRA) as the result of a 'powerful coalition of interest groups' with 'skills-based career paths written into awards to provide alternative means of delivering real wage increases to the trade unionists'. In a more general statement, Ryan (1995) described industrial relations as the 'ghost in the machine of the training reform agenda'.[86]

The relationship between industrial relations and vocational education and training has also been a cause for comment in government documents. For example, in 1992 the NTB (1992) stated that, where appropriate, national competency standards should relate to but not be formally written into industrial awards and agreements.[87] In 1994, a report to the ANTA Ministerial Council[88] indicated that the involvement of many employers in training reform was inhibited by the perceived links between training and industrial relations issues.

In a paper which considered industrial relations and vocational education and training in Australia, Carnegie (1996) based her paper on four key assertions. They were that, historically, there has been a strong interconnection between industrial relations and vocational education and training in Australia manifested by both wage fixation and the apprenticeship system; that the interface is as important today as it has been in the past; that during the last decade there had been a substantial change in the structure of the relationship precipitated by significant reforms in both vocational education and industrial relations as a response to economic restructuring; and that whilst the change process was far from complete, it is clear that the policies of the Coalition Government might recast the relationship into new directions.[89] Further, the author identified award restructuring and enterprise bargaining as two key developments which underpinned labour market flexibility, skill development and structural change.[90] Carnegie identified a number of points which clearly link vocational training to industrial relations. These include the extensive use of tripartite arrangements, which were a hallmark of the federal Labor Government, as an expression of the growing convergence between industrial relations and vocational education and training policy;[91] the industry led nature of training reform, in particular the development of national competency standards;[92] and the potential for industrial parties to reflect competency standards in awards and enterprise bargaining agreements.[93] She also identifies the potential for conflict between training and industrial relations agendas by citing the Joint Industrial Training Council (JITEC) which recognised that agreement 'to reflect competency standards in classifications of restructured awards or enterprise agreements, but also agreement that such relationships did not establish linkage for wage or classification purposes . . . in other industries or enterprises'.[94]

Commenting on the net impact of trade unions on the extent of formal types of employer-provided training in 1989–1990, Kennedy, Drago, Sloan & Wooden (1994) concluded that:

*. . . with respect to formally delivered training programs at least, the net effect of trade unions on training is positive, but only where unions are active within the workplace and not merely de jure representatives of the work-force.*[95]

In a study which aimed to examine the nature of training within Australian enterprises, to describe the context behind the moves to an enterprise-based approach to employer-employee relations and to review the content of a variety of federally registered enterprise agreement, Guthrie and Barnett (1996) evaluated 1913 recent agreements and concluded that about one third made specific mention of training, and only one quarter made provision for a structured or planned approach to training.[96]

Commenting on the status given to training in enterprise bargaining agreements, and agreements listed in 'the Formalised Federal Workplace Agreements Database (WAD) and the Workplace Bargaining Survey 1994 (WBS 1994)', Teicher and Grauze (1996)[97] noted 'the prevalence of training provisions in agreements' but also that:

*The general absence of detailed provisions in agreements mapping out the parameters and implementation of a training program cast doubt on whether the parties to the agreements seriously intended implementing training programs.*[98]

Further, there were some concerns, namely, that there were:

*. . . consistent indications that training is not central to the enterprise bargaining process [and there was] evidence that there is a considerable gap between the inclusion of training provisions and the conduct of training and enhancement of productivity.*[99]

Following the election of the Coalition Government, the industrial relations framework changed with the Workplace Relations Act 1996 (Cwth). The impact of this was commented on by Hewett (1996)[100] who registered concern that:

*. . . under Schedule 13 of the proposed Workplace Relations Act, Senator Vanstone or Dr Kemp will be able to approve certain local groups as an approving authority . . . which will have the power to ratify wage rates in individual AWAs by defining payment only for time spent in 'work' as distinct from time spent training . . . under this provision, the potential for employers to abuse established award training wages is considerable.*[101]



# 8 Major policy themes emerging from the literature

From policy documents which are detailed below in Chapter Four: A survey of policy relating to vocational education and training, 1992–1998 (section 2.2) we have been able to ascertain several key objectives for a national vocational education and training system. These are to develop a national vocational education and training system which:

- allows for the specific needs of States and Territories
- is industry led

- ❖ meets the needs of individuals and under-represented groups
- ❖ equips Australians for the world of work, enhances mobility in the labour market and overcomes skill development and recognition problems
- ❖ provides maximum value for money for public expenditure and increases investment in training by industry

These key objectives will be used broadly as an organisational framework for the remainder of this survey.

## 8.1 A national VET system

General critiques on the movement towards a national vocational education and training system are plentiful and wide-ranging, and it is not possible to provide a complete review of all commentaries within the scope of this project. However, a representative sample is provided. These relate to the origins, themes and effectiveness of the overall reform agenda.

Lingard, Porter, Bartlett & Knight (1995)[102] in describing the impact of the Australian Education Council (AEC), Ministerial Council of Vocational Education, Employment and Training (MOVEET) and Ministerial Council of Education, Employment, Training and Youth Affairs (MCEETYA) between 1987 and 1993, argued that the Commonwealth, supported by the ACTU and predominance of Labour States had pursued a national agenda in education.[103] They described the Ministerialisation of policy formation and the development of a quasi-national system across the sectors of education and across State boundaries for the purpose of producing a multi-skilled, flexible workforce[104] in the context of broader goals of economic reform.[105]

Gonczi and Hager (1992)[106] identified *Australia reconstructed*, *Skills for Australia*, and *Industry training in Australia: Need for change* as key policy documents which had driven training reform. Dudley and Vidovich (1995)[107] identified the *Finn review*, *Carmichael* and *Mayer reports* as turning points. The Dusseldorp Skills Forum (1993)[108] characterised training reform as being 'largely driven by government reports, mostly although not exclusively at a national level' and noted the 'dominance by government officials of the committees producing these reports'.[109]

7.1

Whatever the origins of reform in the vocational sector may be, training reform has been linked to a number of key themes. For example, the Allen Consulting Group[110] described training reform as a search for national solutions with a stress on national consistency and interconnectedness, the development of a national training system, a general move to competency-based training, development of a more diverse and competitive training market, introduction of new entry level training arrangements and measures to promote equity and access. In various documents, the NCVER described the key elements of the National Training Reform Agenda as competency-based training with national competency standards, an open training market, national recognition of

competencies however attained, an integrated entry level training system and equitable access to VET.[111] More recently, Kell (1998) stated that:

> *After ten years of profound reform the VET system has moved from the periphery of education policy into the centre of industrial and economic policy with a national focus.*[112]

He described the fundamental characteristics of the Australian system as the establishment of the training industry, the emergence of a mix of private and public providers and the competitive training market; the distribution of funds on a competitive basis; the introduction of industry-based competencies; an emphasis on transferring the location of vocational training to on-the-job and on-site delivery; and, the introduction of 'user choice'.[113]

The success of training reform has also been reviewed by a number of authors and some offer suggestions for improvement. For example, the Dusseldorp Skills Forum (1993)[114] considered that the reform had a number of admirable features, and had resulted in some positive changes. However, it also considered that the reform process had failed to capture the enthusiasm and commitment of some key stakeholders, and had been widely criticised for its degree of bureaucracy, its top-down approach, and its failure to produce results quickly enough. Curtain (1994)[115] conducted a survey of the major users of vocational education and training and emphasised the strong view of the respondents that more needed to be done to improve the implementation of the training reforms. Some achievements, such as the move to competency-based training and the emergence of a qualifications-based labour market, were noted. However, problems are also identified, for example, the slow pace of change in developing national industry and enterprise standards, barriers to implementation of training reform, including the operation of the federal system, employers' resistance to the Training Guarantee Levy, the need to devolve responsibility for implementing the reforms from the bureaucracies to industry bodies, and the narrow focus of the Australian Vocational Training Certificate System pilots. He finally referred to problems which might arise in the development of the concept of a training market. Lundberg (1994)[116] stated that the pace of achieving change in the VET system of Australia had fallen considerably short of the set objectives, and that this was a consequence of unrealistic expectations about what can be accomplished. He concluded that the national training reform agenda had made significant progress in a number of areas but that without structural and strategic changes, the training reform agenda would take much longer to achieve fruition, and it was likely to be superseded by other aspirations before it was realised.



In June 1994, The Allen Consulting Group found that some objectives were 'imprecise and obscure and did not provide a satisfactory base upon which to build practical strategies', and agreed with the recent statement by the Hon. Ross Free that 'without decisive action by all parties to rectify the difficulties, the reform process is in danger of stalling'.[117] The report made a number of recommendations including the refocussing of reforms to the demand side, the

introduction of 'user buys', rationalisation of national structures, modification of ITABs, increased flexibility in the implementation of the competency standards framework, the development of explicit micro-economic reform plans and strategies for the publicly funded VET sector reflecting the results of the Hilmer report,[118] the devolution of the issuing of qualifications under delegation from government within a quality assurance system in which ITABs would play a key role, and that mutual recognition should be enacted to support the application of NFROT.[119]

Subsequent to the Allen Consulting Group Report described above,[120] in September 1994, the *Report to the ANTA Ministerial Council: Proposals for more effective implementation of training reforms*[121] found widespread support for the components of the training reform and made 35 recommendations. These recommendations included: an emphasis on quality assurance and facilitation rather than regulation in standards development and accreditation; placing the responsibility for developing, endorsing and implementing competency standards more squarely in the hands of industry; providing for more flexible use of the ASF; emphasising the validation of standards by industry and enterprises, encouraging greater involvement in development and acceptance of standards by enterprises; encouraging States and Territories to delegate and devolve accreditation arrangements to 'best practice' providers and ITABs; minimising delays in accreditation processes; simplifying national structures and improving national co-ordination by bringing the activities of the NTB, ACTRAC and NSDC within a single national agency to achieve effective national recognition of training; and, focussing on demand from enterprises and individuals by piloting a 'user choice' approach at the enterprise level for apprentices and trainees.

More recently, the *Report of the review of the ANTA Agreement 1996*[122] provided a thorough survey and discussion of issues relating to better allocation of the resources for vocational education and training. This report recommended that ANTA develop a national policy on competition in vocational education and training for consideration by the Ministerial Council and implementation by State Training Agencies, and that State/Territory governments focus on improvements in their training systems by ensuring market regulation which is efficient, client oriented and does not discourage competition; establishing a clear separation of functions between the purchaser and the provider of training; putting TAFE on a proper commercial basis; and promoting competition and other 'market-like' mechanisms. The issue of improving the national recognition of training was also canvassed, and the difficulties noted. The recommendations made included, *inter alia*, that the States and Territories should move 'from the central accreditation of courses and shift their regulatory focus to provider recognition' and that 'legislation be introduced in all States and Territories to ensure reciprocal recognition of providers and courses'. Issues related to access and equity programs were also described and criticisms noted, and issues relating to cross-sectoral links were examined.[123]

Competency-based training was an essential element of training reform and there is an extensive body of literature which describes, reviews and critiques issues such as its origins, underpinning assumptions, and, influence on teaching and learning. Given the emphasis of this project, it is not possible to provide an extensive review of this literature. However a few examples are cited.

The development of industry competency standards and competency-based training have been seen as central to the development of a national, industry-led vocational education and training system. The National Training Board was established as a result of a Ministers of Vocational Education Employment and Training decision in 1990, the Board's responsibility was to ensure that there was an established framework of standards which facilitated the development of a nationally consistent and responsive vocational education and training system,[124] and National Competency Standards were described as the benchmarks for the emerging national system of vocational education and training.[125]

Harris, Guthrie, Hobart & Lundberg (1995)[126] provided a comprehensive review of the contexts in which CBT arose, issues relating to CBT, its implementation and its evolution as a concept. However, whilst they provided a description of the policy context of CBT there was little critical review of this policy alone or of the broader training reform agenda. More specifically, Smith (1993)[127] identified competency-based training as the key to fulfilment of most of the objectives of the Training Reform Agenda forming the basis for the recognition and accreditation of training at a national level, credit transfer between educational providers, and registered credentials with consistent assessment. From a theoretical basis, Stevenson (1993)[128] analysed CBT from the perspectives of economic assumptions and concluded that until assumptions impelling CBT were made problematic, the concept of skills would not be constructed appropriately.

Other authors have commented on CBT, workplace training and industry standards. For example, Humphrey (1992)[129] highlighted a number of ways in which the *Finn review*, with its focus on institutional learning, undervalued workplace training and did not provide, apart from the key competencies, a detailed account of the changes which would be required to curriculum or education and training delivery systems to achieve the targets set by the Committee. Sweet (1992)[130] was critical of the emphasis upon national frameworks for levels, assessment and reporting. Curtain and Ormond (1994)[131] urged active enterprise initiative in implementing industry-wide standards which had been developed, and provides an example of how this might be done. Lundberg (1994)[132] suggested that substantial progress had been achieved even though the dimension of the task still to be done was formidable.

In 1994, the Allen Consulting Group[133] recommended increased flexibility in the implementation of the competency standards framework and found that some providers and industries had not adopted competency-based training but had continued with a 'time served' approach.

Following the election of the Coalition Government, changes to curriculum, accreditation and mutual recognition were announced under the term National Training Framework (NTF). To date, there is limited review of these changes. However, Chapman (1997)[134] noted that $350 million had been invested in curriculum since 1992, and that training packages which replaced national curriculum learning strategies would be an optional component developed by ITABs. He discussed a number of issues which providers would need to address in the implementation of the NTF.

## 8.2 A national system which meets the needs of the Commonwealth, State and Territory governments

Tension between the interests of national, State and local interests have been identified by a number of commentators. Historically, ANTA emerged following an attempt by the Commonwealth to take over responsibility for VET. Dudley and Vidovich (1995)[135] reported that in 1992, Paul Keating announced a $720 million package for TAFE over three years in exchange for the Commonwealth assuming funding responsibility for VET. This was rejected by some States and the Prime Minister threatened to establish a federal system of TAFE and withdraw funds from the States if they did not comply. On the eve of the 'Youth Unemployment Summit' in July 1993, an agreement was reached which resulted in the establishment of ANTA as a co-operative Commonwealth-State venture.

This was not the last time that the Commonwealth indicated an interest in assuming responsibility for VET from the States. In 1996, Senator Amanda Vanstone referred to a National Commission of Audit which recommended that this should occur and she stated that '[there] has always been a strong case for the Commonwealth to have responsibility for VET'.[136] More recently, in 1997, tensions were evident with the renegotiation of the new ANTA Agreement when the Federal Government insisted on 'efficiency gains' from the States and Territories. This resulted in the cancelling of ANTA Ministerial Council meetings and a threat to withdraw federal TAFE funding if the States did not agree to their package by 29 September.[137] However, the 1998–2000 ANTA Agreement was approved by the Ministerial Council on 14 November, 1997, subject to approval by respective cabinets.[138]



Earlier, in 1993, the then Commonwealth Minister for Schools, Vocational Education and Training made reference to the tension which could occur between Commonwealth and State or Territory views of a National VET system. He stated that:

> *Training reform is a national issue and can only be implemented with any hope of success at a national level. But we must tread a careful course between asserting national interests and recognising local concerns. Our federal system means that all States and Territories must be involved in any system of national reform. This*

*inevitably means committees and as we all know committees inevitably mean wasted time and duplicated effort. It also can mean obstruction as parochial panjandrums seek to protect their own patches. Not all TAFE and training systems are equally committed to the good of the nation as a whole. This does not mean that the agenda will fail but it does mean that it will move forward far more slowly than it needs.*[139]

The tension between Commonwealth and State or Territory agendas has also been noted by other authors. For example, Sloan (1995)[140] considered that there has been ongoing rivalry between the federal and State levels of bureaucracy. Lingard, Porter, Bartlett & Knight (1995)[141] described the tensions between the Commonwealth and the States over funding for and control of TAFE and relationships between the school sector and the TAFE sector. Generally, they drew attention to what they consider to be an increasing ministerialisation of policy processes. They characterised the federalism in the TAFE sector as being 'a more co-operative federalism . . . through the workings of ANTA'.[142] McKenzie (1996)[143] also identified the dissonance between State policies and operations and national objectives.

Some commentators have also commented on how well a national system could meet local needs. For example, Mead (1995)[144] considered that a major constraint on the pace of change had been the need to weld together the eight State and Territory systems of VET into a single national system, and, considered that despite the recent changes in the TAFE system, some problems including the centralised funding and decision-making which limit the capacity of individual TAFE institutions to respond to local needs. In relation to the impact of training reform in Tasmania, Koo (1997)[145] considered that more attention must be given to implementation needs at the local level in the development of national initiatives, and that for those regions with a limited employment base there was a need for initiatives that will allow those Australians with limited access to work places, an entry point to the VET system. It was suggested that:

*This will require a change in focus from designing Rolls Royce models of training, designed to meet the needs of large employers, to simple, cost efficient and effective training structures that catered for small business and those without access to work places. That is, flexible structures and flexible thinking.*[146]



It is apparent that the tensions between national, State/Territory and local need in training are a continuing issue in training reform. Lingard *et al.*(1995) recognised this relationship in identifying the difficulty of creating a national system of education within a federal political structure, and the impediments to individual State systems pursuing their own agenda without reference to the national context.[147]

## 8.3 A national system which is industry led and meets the needs of individuals and under-represented groups

### 8.3.1 An industry led system

A number of authors have commented on the role of industry on industry advisory bodies and although there has been continued restructuring of industry involvement in training reform, this issue still appears to be problematic. For example, Lundberg (1994)[148] commented on the desire which industry might have in becoming involved in policy. He considered that the experience of ITABs suggested that making more opportunities available to industry to advise TAFE would not necessarily lead to a commensurate response from industry, in quantity or quality of advice. In September 1994, a report to the ANTA Ministerial Council made a number of recommendations. These included: enhancing the role of ITABs; placing the responsibility for developing, endorsing and implementing competency standards more squarely in the hands of industry; emphasising the validation of standards by industry and enterprises; encouraging greater involvement in development and acceptance of standards by enterprises; and, encouraging States and Territories to delegate and devolve accreditation arrangements to 'best practice' providers and ITABs.[149]

A number of authors have also commented on the enthusiasm with which some sections of industry have taken up involvement in advisory bodies. For example, Curtain (1995)[150] concluded that many employers see industry training advisory bodies as another arm of government and often lack a broader employer representative or regional basis. Butterworth (1995)[151] identified one problem of the national training reform agenda (NTRA) as the driving of the agenda by government bureaucracy to the exclusion of industry. Sloan (1995)[152] considered that whilst the employers response to the NTRA had been less than a fulsome endorsement, the distinction between large and small employers needed to be made. Whereas very small employers have no knowledge or involvement in the training agenda, large employers had played a broader role in the NTRA with direct representation on some bodies and using their size as leverage, they have been keen to influence reforms in the publicly-funded VET system. Also, Callus (1994)[153] considered that policy makers often gloss over the uneven impact of policies within different segments of the economy and the complex and unexpected ways in which policy can impact. He particularly cited concern that initiatives such as the revamping of ITABs, the introduction of the Training Guarantee legislation, the development of accredited competency standards and pilot programs for the AVC seem to have been introduced with little attempt to gauge the impact, relevance or consequence for small business. McKenzie (1994)[154] indicated that current training arrangements had not convinced large segments of Australian business that investment in training is essential for their continued prosperity.

Some authors also comment on the lack of representation by training providers on advisory boards. For example, in 1993 Goozee[155] considered that representation from the TAFE sector was noticeably lacking on the board and councils. There was one TAFE representative on the NBEET Board and a nominee of the TAFE Principals Association on the ESFC. Despite consultation with the chair of the taskforce, the Australian Conference of TAFE Directors was not represented on the council. This meant that TAFE no longer has any significant input onto major national advisory bodies. In referring to the effects of a competitive market policy on TAFE, Fooks (1996)[156] observed that there was no decision making or advisory body of any significance on which providers or teachers were represented, and that decision makers no longer had empathy for TAFE's community role or acknowledged that its mission has a social as well as training objectives.

### 8.3.2 Meeting the needs of individuals and under-represented groups

The 1997, *Stocktake of equity reports and literature in vocational education and training* published by ANTA included summaries of literature on women, Aboriginal and Torres Strait Islander people, people with disability, residents of rural and remote communities and people of non-English-speaking backgrounds.[157] This document identified a significant body of literature relating to access and equity in vocational education and training. Within the scope of this project, it is not possible to provide a detailed review and we offer, therefore, some indicative illustrations of the literature.

Variations in access, participation and outcomes in training have been discussed by a number of authors. For example, Golding and Volkhoff (1997)[158] reported on the results of research into barriers to access, participation and outcomes in VET for seven different client groups in Australia. The authors concluded that individual client needs, and those of industry, are not easily conflated by a single focus on industry or an assumption that all VET is directly work related/vocational.



Ferrier (1995)[159] examined policy and practice relating to equity in access to VET for those disadvantaged in the labour market and described the findings of research as to the effectiveness of the policy. Noting the need for more research, Ferrier concluded that:

> *Early research on the progress of equity in the VET reform process indicates . . . that there is a gap between the expressed commitment to equity, and what is happening in practice. Moreover, a fear is being expressed that some elements of the reform process may work against further progress being made, or may even wipe out existing gains.*[160]

This finding is supported by Bagshaw (1996)[161] who reviewed planning mechanisms at a State and national level and stated that:

> *. . . as perhaps can be expected, the quality of advice being provided through these mechanism on access and equity issues, is at present patchy . . . while the planning*

*processes require identification of strategies directed at key features and at client group needs, this is not being brought together in a meaningful way.*[162]

Research studies into the implementation of training reform offer different but significant insights. For example, in undertaking a literature review to consolidate existing statistics on training and women, to examine patterns of training for women, the factors that encourage the development of effective strategies, the management practices and politics which inhibit the delivery of effective training for women, Knox and Pickersgill (1993) concluded that:

> *In the key policy documents there appears to be a primary assumption that if a national training framework can be established then the details of equity will resolve themselves. This entails secondary assumptions that the training market will adequately and equitably distribute training opportunities.*[163]

In examining the likely impact of the open training market on women's participation in TAFE, Barnett (1993)[164] concluded that one central concern to be addressed in a move to the open training market was the need to maintain access and equity as a linchpin rather than an unnecessary cost. Further, competition between public and private providers raised the question of whether this direction further entrenched inequities or provided opportunities to enhance equity. Lawrence, Butler & Simons (1995)[165] found that women experienced significant variations in access to training according to their employment sector and employment status. Brown and Rushbrook (1995)[166] provided an overview of how the training of 'operatives', that is workers whose skills were traditionally learnt by on-the-job training or short courses, and which were not part of any recognised system of credentials, had been included in the NTRA. The authors concluded that although the recognition of the training of operative by the NTRA was generally a positive development, caution must be exercised because 'well-intentioned statements on training and equity' do not necessarily overcome the practical difficulties arising from disadvantages such as class, gender and ethnicity, nor ensure the future worth of the credentials gained and recognised. Further, the authors suggest that future changes in economic conditions and political developments may not protect the advances made.



Wallace (1995)[167] provided a focussed, succinct feminist critique of training reform by briefly examining some examples of research which had examined the language of several of the major reports and of official documentation published in the development and implementation of the national training reform agenda (NTRA). The author carried out work since the early 1990s 'with women workers in occupational groups currently (and problematically) classified as "unskilled", low skilled or, at best, paraprofessional'. Among the positive outcomes noted were the opening up of training reform issues, the improvement of training opportunities for women, the challenging of 'traditional gendered notions of skilled work developed in trades through apprenticeship', more attention being paid in labour market programs to the needs and interests of women, and funded research into issues in feminised industries.[168] The recognition of prior learning

(RPL) and the funding of general equity initiatives through the National Plan of Action for Women in TAFE were also noted as positive developments. That there had been an increase in Australian research on work, education and training since the late 1980s was noted, and the authors were of the opinion that this had enabled 'critiques of the NTRA and its documentation'.[169] The writers expressed the view that, although the development of a more localised approach had moderated the thrust towards a national curriculum, and this might offer improved opportunities for training for women, the combination of 'industry-user-choice', private providers with no interest or expertise in equity or women's training needs and the increasing casualisation of a largely part-time female workforce could prove very damaging to the modest progress so far.[170]

Seddon, Dillow, Dalton & Broadstock (1995)[171] provided critiques of the implementation of the NTRA from a variety of viewpoints. Like Wallace, these authors were critical of how the language of equity and women's concerns were dealt with in the national training reform agenda (NTRA) and, like other commentators, noted the tension between the national goals of the NTRA and the local interests.

In a study which examined the position of women in the NTRA and enterprise bargaining agreements, Smith and Ewer (1995)[172] explored the importance attached to training issues in the bargaining process and detailed a range of workplace changes likely to affect the capacity of working women to take up training opportunities. They concluded that:

> *Perhaps the most important implication arising from [their] research is that the pattern of workplace change thus far is unlikely to alter the shape of demand for training as education markets develop. This suggests that women will not gain the publicised benefits from the National Training Reform Agenda.*[173]

In relation to indigenous peoples, the Aboriginal and Torres Strait Islander Peoples' Training Advisory Council (1997) described Aboriginal and Torres Strait Islander Australians as suffering the most extreme labour market disadvantage of any group in the Australian community, and, identified barriers to access and outcomes.[174]



The impact of national training reform for NESB workers was discussed at a seminar conducted by the Office of Multicultural Affairs and the Department of the Prime Minister and Cabinet in September 1995. At that conference, Hannigan (1995)[175] suggested that competency-based training offered distinct advantages to NESB workers as there was a clear statement of the nature and level of competency required, the capacity for incremental attainment of competency and the recognition of prior learning, whether gained informally and/or overseas.

Bagshaw (1996) speaking for the Steering Committee on Access and Equity, stated that '[providing] access and equity for particular groups in our community has been at the centre of government social justice platforms for a very long time'.[176] The author identified National VET Women's Strategy and the National

Aboriginal and Torres Strait Islander Education Policy as examples of manifestations of the governments concern for access and equity:

> *. . . while we can identify that policy supporting equity considerations is in place, it is not always easy to see where or how this is being applied or implemented.*[177]

and:

> *Because of the complexity of many of the key features of the national training framework, and, the complexity of arrangements for their development and administration, the inclusion of adequate mechanisms to ensure that these things are appropriate for client groups may continue to be placed in the too hard basket.*[178]

To date, commentary on how policies of the Coalition Government have impacted on access and equity in the training market have been limited.

## 8.4 A national system which equips Australians for the world of work, enhances mobility in the labour market and overcomes skill development and recognition problems

A number of policies have been influential in attempts to achieve this objective. They include: the influence of industry training advisory boards (ITABs); the search for a system of program accreditation and provider registration which has manifest in the National Framework for the Recognition of Training (NFROT) and more recently the National Training Framework (NTF); attempts to develop a national system of skill recognition and qualifications through the Australian Standards Framework (ASF) and more recently the Australian Qualifications Framework (AQF); an endeavour to develop a universal entry level training system through apprenticeships, the Australian Traineeship System (ATS), Australian Vocational Certificate Training System (ACVTS) and more recently the New Apprenticeship System (NAS) with the associated development of NETTFORCE and Group Training Companies which were established to encourage employers and small business to take on trainees. These issues have been briefly surveyed elsewhere in this chapter, however, it should be noted that further details are provided in Chapters Four and Six. Further, as noted earlier, more recent changes in labour market program and school-to-work transition policy have occurred since the election of a Commonwealth Coalition Government in February 1996. These also are described in further detail in Chapters Four and Six.

8.1

In this section, we will survey some of the literature which reviews those labour market programs which could be said to have been an attempt to achieve the objective of developing a national system of vocational education and training which equips Australians for the world of work, enhances mobility in the labour market and overcomes skill development and recognition problems. A further limitation of this survey is that it does not attempt to deal with the literature which concerns itself with economic analyses of these programs.

The activities of the Commonwealth in labour market programs since the 1970s have been described in Chapter Two, and a useful review of these programs is provided by Goozee (1993).[179] Burgess (1992) also provides a useful contribution in citing Whitfield (1987, ch. 8) who contended that until the mid-1980s, labour market programs were based on an ad hoc response to increasing unemployment, some schemes were an expensive way to create a small number of jobs, training and vocational schemes equipped participants with skills for jobs that did not exist and there was a lack of long term labour market planning.[180]

In 1985, the *Kirby report* made a number of recommendations including the implementation of the Australian Traineeship System (ATS). Goozee (1993) described the ATS as:

> *. . . a system of traineeships which would combine broad-based vocational education and training in an institution with work in a related occupation, to form an integrated training system.*[181]

She continued:

> *The primary objective of the ATS was to provide a system that borrowed the strengths of the apprenticeship . . . without the stringent legislative obligations and to introduce the system in areas where traditionally, there had been little provision of formal training.*[182]

Knox and Pickersgill (1993) also reflected on this and described the ATS as:

> *. . . an important change in the approach to vocational training. Although the Australian Traineeship System has not attracted the originally expected numbers, the inclusion of female dominated occupations in its scope reflect an (as yet unrealised) potential to extend entry level training beyond traditional boundaries.*[183]

The success of the implementation of this program was a source of comment by the Dusseldorp Skills Forum (1992) which observed that the appeal of the ATS had been limited 'in large part due to the inflexibility with which it was implemented and the limited extent of real industry ownership of the system'.[184]

In reference to the Carmichael report, Goozee (1995) described the main recommendations as:

> *. . . the establishment of a competency-based Australian Vocational Certificate System [which would merge] apprenticeships and traineeships . . . which would provide a flexible range of fully articulated, substantially work-based training pathways . . . [and where] current award wage rates for young people [would] be replaced by training wages.*[185]

The Dusseldorp Skills Forum (1993) stated that whilst little was new in the AVCTS, the system brought together a number of separate themes. They noted the emergence of the Career Start Traineeships, which endeavoured to make traineeships more flexible, as a result of failure to meet agreement on the off-the-job training component of the AVCTS.[186] Goozee (1995) reported that following agreement by Ministers in 1992, a series of Australian Vocational Certificate Training System (AVCTS) pilots would be undertaken in 1993 and 1994.[187]

Reporting on the delayed implementation of the Australian Vocational Certificate (AVC), Lundberg (1994) stated that whilst Ministers had originally decided on implementation of the AVC system from January 1995, it had since been decided that general application would occur between January 1995 and 1997. He observed that this was 'very optimistic'.[188]

In reviewing the impact of *Working Nation*, which was published in 1994, the Employment and Skills Council of the National Board of Employment Education and Training (1996) also noted the slower than planned implementation of the Australian Vocational Training System (AVTS) but claimed that 'the momentum has picked up in the past 12 to 18 months'.[189] They identified impediments to a training culture the reversal of which, they contended, would increase participation in training and employment for young people.[190] In conclusion, the report stated 'the NTRA rhetoric had run well ahead of the capacity of the bureaucracy and the training sector and industry to deliver'[191] and that there was a 'lack of knowledge, understanding and/or non-acceptance of many policy directions and decision'.[192] In addition, they concluded that the National Framework for the Recognition of Training (NFROT) was clearly not working.[193]

National recognition of training was also a topic for comment in the *Report to the ANTA Ministerial Council: Proposals for a more effective implementation of training reforms*[194] which recommended the establishment of a single national agency to achieve effective national recognition of training. The issue of national recognition of training was also canvassed by in the *Report of the review of the ANTA Agreement 1996*.[195]

Earlier, Freeland (1994)[196] critically analysed the then Labor Government's White Paper proposals for labour market program development and provision. Freeland argued that whereas most of the policy and program proposals were progressive and warranted support, the push for large numbers would jeopardise the implementation of quality improvements and outcomes for program participants. He concluded that, to that time, labour market program assistance had been distributed too remotely and thinly and that there had been an emphasis on maximising program numbers rather than on quality long term outcomes. He identified emphasis on positive trends in labour market programs since the 1970s. These included the trends to individual case management; decentralised local program delivery and administration; greater articulation between labour market programs and the VET system; more open and participatory approach to local, regional, area and national policy and program development and delivery; and greater industry participation in the development and delivery of programs.

Following the election of the Coalition Government in 1996, a number of significant reforms to entry level training, and traineeships and apprenticeships were announced. In particular, it was announced that the majority of labour market programs involving structured training programs would be discontinued, and that existing traineeship and apprenticeship programs would be reformed to

become what was initially known as the Modern Apprenticeship and Traineeship System (MAATS) and became known as the New Apprenticeship System (NAS). At this stage, commentary on these changes appears to be extremely limited. However, in a 1997 interview, Dorothy Kotz, the Minister for Employment, Training and Further Education and Minister for Youth Affairs in South Australia stated that training programs had previously been for training's sake and had made no difference to unemployment figures, and that there was a need to ensure that training programs had a definite outcome of jobs.[197]

Commenting on the reforms to traineeships and apprenticeships, Wheeler (1997)[198] described the reforms as an industry led, demand driven, system operating in a competitive market framework and stated that there were concerns as to whether the system could benefit a full range of Australians. Fooks (1997a)[199] considered that the new system would address some of the inadequacies of the old system but was unlikely to arrest the decline in apprenticeship numbers and had the potential to aggravate the situation. In particular he registered concern that the nations skill base would be eroded if 'lightweight traineeships' substituted for apprenticeships as the preferred choice of entry level training.

In reference to the development of a 1998–2000 National Strategy for VET, Peoples (1996)[200] made specific reference to changes in labour market programs, traineeships and apprenticeships when he stated that:

> *I think it is characterised by what I might call a narrow focus and there are three aspects to that narrow focus. It does seem to me to concentrate on those people already in work. Secondly, there is a narrow focus in terms of what skills are required. They will be determined by the employers based on what the enterprise needs and, thirdly, there seems to be a concentration on MAATS, which is a narrow focus looking at entry level training only and that represents apprentices and trainees which are, in fact, approximately 20 per cent of all VET students.*[201]

He asked: how do we balance the new flexibility that will come as a result of MAATS, of an employer driven system with regional and local needs with the national frameworks that we have already in place? Furthermore, he identified ensuring quality in a devolved system and the risk that State and Territories are likely to be recalcitrant when co-operating with the national plan as areas of concern with the reform process.



What can be concluded from this short survey, is that since 1985, the Commonwealth in alliance with the States and Territories has attempted to develop a nationally consistent and recognised entry level training system which prepares individuals for the world of work, overcomes skill development and recognition problems and provides for mobility. The Australian Traineeship System, the Australian Vocational Certificate Training System and the New Apprenticeship System are all manifestations of this endeavour. They have all attempted to build on the strengths of the traditional apprenticeship system whilst removing what have been considered to be restrictive regulatory practices

associated with apprenticeships. In particular they have attempted to broaden the range of industries where this type of training is available, to make training more flexible and work based and to promote skill development in secondary schools. In each case, targets for implementation have been set but not achieved prior to the succession of one program by the next.

## 8.5 A national system which provides maximum value for public expenditure and increases investment in training by industry

In 1987, *Skills for Australia* identified increasing private sector investment in training and skills formation as one action required to increase participation in education and training. In 1988, *A changing workforce* noted the need for industry to increase investment in education and training, and, *Industry training in Australia: The need for change* canvassed two broad approaches to increasing industry investment in training. As a consequence, the *Training Guarantee Act* was introduced in 1990. Commentary in the literature broadly falls into two areas. Firstly, it deals with the development of a 'training market' which was expected to increase competition in the provision of vocational education and training by decreasing the effective monopoly which public providers (TAFE) had experienced in the provision of training. Secondly it reviews the Training Guarantee levy which aimed to increase industry's financial contribution to the provision of vocational education.

Ryan (1995)[202] and Anderson (1996)[203] considered that the concept of the training market did not explicitly arise until the 1990 *Deveson review* which supported the creation of a more diverse training market, introducing the user pays principle and commercialising the TAFE system. The pursuit of a training market was formally incorporated within the national goals adopted by MOVEET in 1992 and DEET described the national goals for vocational education and training which included the development of a national VET system in which publicly funded, private and industry providers could operate effectively, efficiently and collaboratively and which meets the needs of industry and individuals.[204]

Shelby Smith (1995)[205] examined the implications of the Hilmer report, *The report of the Independent Committee of Inquiry into a national competition policy* for the vocational education and training system. The principles in this report have now been endorsed by State, Territory and Commonwealth Governments.[206] In particular, the paper sought to identify issues of importance for training markets and points of strategic intervention which might be pursued to facilitate the development of a more open and competitive markets, consistent with the principles of the proposed national competition policy were described. Selby Smith (1995) stated that:

*In simplest terms, a market is a place or device where buyers and sellers meet to negotiate exchange. The Hilmer report offers a more sophisticated definition where a market is an area of closer competition or rivalry in which one product or source of supply may be substituted in response to changing process.*[207]

Other commentators have remarked on the lack of a clear definition of the 'training market'. For example, Fisher (1993)[208] commented on the rarity of discussion of what this market might involve, the expectations of the perceived gains or discussion of how disadvantages might be alleviated. He also noted that the training market concept was effectively absent from equivalent policy debates in North America and Asia. Anderson (1996) described the 'concept of the training market as ill-defined, open to multiple meanings and interpretations, and characterised by a lack of precision in usage',[209] and that there was 'almost a total lack of attention paid to the educational implications of market reforms in VET'.[210]

Some authors engage in discussion of three issues which might be characterised as 'competition in the training market'. They are the balance of public and private provision of training, competitive tendering and user choice.

With reference to public and private provision of training, Mead (1996)[211] noted that a major element of training reform had been the drive to create a more competitive training market to improve efficiency within the VET system and to encourage a greater client focus. The aim was to break down the monopoly held by TAFE in the provision of vocational education and training, reduce the role of government in training provision and foster closer provider/client relationships.

In reviewing the research literature in a submission to ANTA, the NCVER (1997) concluded that there was insufficient evidence to support or refute claims that increased competition would produce the benefits claimed by proponents or the severe drawbacks speculated by the opponents of the training market.[212]

The role of TAFE in a competitive training market has been considered by Ramsey (1993)[213] who canvassed a number of issues in relation to ANTA and the State and Territory TAFE systems. He identified the role of TAFE as that inherited from Kangan in 1974, namely to meet the needs of industry, social needs and individual needs. He argued that the issue in 1993 was to find new directions which incorporated the meeting of these needs and enunciated the hope that ANTA would provide a means of doing this.[214] The thrust of his argument was that TAFE 'has a key and central role in the system', because the TAFE systems:



> *. . . have the most diverse experience of mediating between, and building consensus among, the diverse perspectives of those in the new system. We know how complex the national system is and how to make it work. And if it is to work, it must have our first class TAFE systems at its core, as prime deliverers. TAFE systems must meet industry needs of course, but also meet social needs—such as providing better opportunities for Aboriginal people, people in distant parts of Australia, migrants, women, people with disability, as well as the individual needs of every Australian who wants to come to us to learn.*[215]

In assessing the effectiveness of the training market, Anderson (1994) also promoted a dual sector training system.[216]

Competitive tendering for government funded training is a policy which is used by funding authorities to introduce competition into the training market. In discussing the implications of the introduction of competitive tendering for the TAFE sector the chief executive officer of ANTA, Terry Moran (1996)[217] explained:

> *In this context, competitive tendering means that a standard product—that is, a State-wide accredited course—is put out to a range of providers who compete on price. There is less emphasis on quality and services as the basis of competition.*[218]

Moran suggested that some benefits of competition had already been felt including the fact that industry and students saw the TAFE systems as being more responsive, and that TAFE colleges had responded positively to the demands of fee-for-service provision. However, some difficulties noted were defining who is the 'client', and developing a regulatory framework which defines the market. He foreshadowed that changed funding arrangements and changes in the roles of both federal and State and Territory government agencies will in future reduce the role of government bureaucracies in the delivery of vocational education and training.[219]

Earlier, the dangers of creating a competitive market were discussed by some authors. For example, Yeatman (1994)[220] suggested that there was a good deal of evidence to indicate that the tendering process was unlikely to facilitate system-wide development and learning. Lundberg (1994)[221] identified the possible conflict between competition and co-operation, where competition may operate to reduce co-operative attitudes because arrangements previously provided on a 'public interest' basis become strictly 'user pays' arrangements. He argued for clear policy objectives in the balance between the two principles and a clear description of what the 'open training market' meant.

In addition to competitive tendering, individual choice in the selection of training programs and providers is another policy direction which has been promoted as a means of developing a more competitive training market. The Allen Consulting Group (1994)[222] recommended the implementation of a 'user buys' approach to shift the balance of power away from providers to clients, and ANTA (1995)[223] identified user choice as a key feature of the VET system aimed at achieving clients greater choice in the purchase and delivery of training to best meet their needs. Curtain (1995)[224] concluded that user choice failed to address the broader issue of employer involvement in the training market, and that small employers would lack power in a training market of large, well resourced TAFE systems. He identified several flaws in ANTA's decision to adopt user choice. They were, the lack of attention given to how to provide good information at a college level about basic performance measures in order to enable enterprises to make informed choices; an absence of understanding of determinants of the decision to train and the constraints faced at an enterprise level; and the continuation of allocation of funds by an all powerful central agency. More

recently, Selby Smith and Selby Smith (1996) indicate that there is no common, agreed definition of user choice and described the objective of user choice in the following terms:

> *. . . to increase the responsiveness of the VET system to the needs of its users/clients through the encouragement of a direct and market responsive relationship between individual providers and user/clients, particularly enterprises and their employees.*[225]

The authors also identified a number of key issues which should be addressed in relation to user choice.

Third Party Access is the third aspect of policy aimed at increasing competition. In a paper based on a report to ANTA, Selby Smith and Selby Smith (1997) describe Third Party Access as:

> *. . . the right of access by alternative providers to publicly funded infrastructure which it would not be economical and in the interest of the VET system to duplicate; and where a denial of access would unduly restrict access to a particular market.*[226]

They observed that at early 1997, there was no general right of third party access and that no State or Territory training authority appeared to be developing such a policy. The paper engages in a discussion of a number of issues relating to third party access. In addition, the paper examines current status of separation in the roles of the purchaser and provider of training, and reviews the situation in each State and Territory.[227]

The contribution of industry and individuals to funding the training market has also been considered in the literature. The training guarantee legislation, introduced in 1990, represented an attempt by government to increase the contribution of industry to funding the training market. The legislation was suspended in 1994 and repealed in 1996. The Dusseldorp Skills Forum (1993)[228] considered that the training guarantee provision was enacted without strong support from employers. Smith (1993)[229] took the view that, at that time, there had been no definitive study of the effectiveness of the Training Guarantee Scheme. Teicher (1995)[230] suggested that the training guarantee provisions had proved controversial as the exemptions for small business meant that 85 per cent of employers were not required to comply with the Act. However, 60 per cent of those employers that were covered by the scheme had reported no training expenditure in 1990. The Evaluation and Monitoring Branch of DEETYA (1996)[231] produced a report on the Training Guarantee legislation before the government's decision to abolish it. The Branch found that the training guarantee proved to be a reasonably effective program for the time at which it was introduced and that it had protected existing training activities at a time of recession. It also found that overall training activity of Australian industry had grown during this period. It was concluded that from a Commonwealth's point of view, the levy had been highly cost effective but that compliance costs in some industries had been higher than expected. Overall, however, the training guarantee provision had failed to produce benefit in areas where there had been no tradition in training, and in

small businesses. It was also found that the levy had been ineffective in increasing access for disadvantaged groups.

More recently, reporting on ABS data, Robinson (1997) compared expenditure per employee, training time per employee and percentage of employers providing structured training between 1993 and 1996. He concluded that the data suggested the suspension of the Training Guarantee legislation had some negative impact on the proportion of employers providing structured training.[232]

In relation to payment by individuals for their training, Lundberg (1994)[233] reported that the Kangan report recommended the abolition of tuition fees in TAFE but they were reintroduced at the suggestion of the Deveson report and there had been a considerable growth in non-tuition administrative charges and fees. He considered that the potential effect of tuition fees on disadvantaged clients was a matter of serious concern. In a discussion paper the impact of fees and charges on disadvantaged groups of TAFE, Barnett (1994)[234] made extensive reference to the work which was commissioned as a result of the Deveson review and undertaken by Powles (1990).[235] Using the outcomes of this and other research Barnett concluded[236] that it was essential that fees were not treated as an isolated variable influencing participation but as one which interacted with other barriers to participation, household income, psychological and sociological factors, methods of payment and the relationship between the fees paid and individual investment decisions. Long, McKenzie & Sturman (1996) examined the economic outcomes of participation in vocational education and training and investigated differences in participation in TAFE by persons from different social and educational backgrounds. In presenting their conclusions, the authors warned:

> *Until there is a consistent body of research evidence which supports the proposition that vocational education uniformly produces reasonable returns to students, there is a need for caution in policy and program changes which would make vocational education more expensive for its students.*[237]

They also asserted that policies which increased the costs of vocational education to students might well prove to be disincentives for the undertaking of that training, and that policies encouraging equity of participation in TAFE, which is already more accessible than the higher education sector, 'only makes (sic) sense if that participation delivers the goods in terms of increased earnings and better prospects of employment'.[238]

Following the election of the Liberal/National Party Coalition in 1996, the incoming government demonstrated its commitment to an open training market by implementing competitive tendering, user choice and support for private training providers. However, there was an absence of uniform enthusiasm for the training market concept amongst the States. At the 1996 ANTA National Conference, the Hon. Dr Bob Such (1996),[239] Minister of Employment, Education and Further Education in South Australia, voiced some general concerns



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regarding the emergence of the training market. He warned that private and industry providers lacked the critical mass required to answer the challenges of meeting emerging training needs, and that care needed to be taken in moving too quickly towards diversification in the training market. He also raised questions regarding issues of monitoring, quality assurance, access and equity, and, who should pay for the training effort.[240]

The private provider organisation ACPET also voiced some concerns. Walsh (1996) observed that the level playing field the government had spoken of was 'in many instances . . . full of enormous pot holes'[241] and Menso (1997) stated that 'moves to reform the VET sector [had] been based on the false assumption that industry drives the training market'.[242] In her view, the training market was driven by providers not industry. She considered that placing funds in the hands of industry and making delivery more flexible could not be assumed to create a training culture or boost industry participation in VET.

Speaking from a union perspective, Roe (1997)[243] stated that:

> *. . . the biggest problem with a competitive market in the VET system is that there is such a confusion of 'demand' and 'supply', of 'users' and 'suppliers', and such a diversity of market conditions.*[244]

He prompted the need to balance the needs of individual employers, industry, students and workers, government and society.

Fooks, Ryan & Schofield (1997)[245] stated that '[a] competitive training market is something that was mandated in the ANTA Agreement. The case for such a market has neither been made nor debated publicly'.[246] Their paper proposed that the framework for a vocational education and training system and the participation of TAFE sector within that system should be based on a national quality assurance system, conferring on TAFE institutions the same degree of independence as other training providers, and the establishment of a new national body broadly representative of the major stakeholders, to provide advice on national directions, policy and priorities.

In relation to support for Group Training Companies, Fooks (1997b)[247] considered that whilst group training was designed to increase the participation of small employers in training, it had increasingly become a device for larger employers to avoid their responsibilities as employers and trainers by passing the cost of training to the public purse.

In relation to user choice, Anderson (1997)[248] suggested that the lack of a sufficiently diverse range of providers, the capacity for effective user choice was extremely limited as was the potential for generating greater competition between TAFE and non-TAFE providers. Christie (1997)[249] observed that there was no guarantee that user choice would be available in all markets. Fooks (1997)[250] also suggested that there was a lack of recognition that user choice would work without widespread use of brokers to act as a link between employers and providers. He noted that this contradicted the concept of user

choice which aimed to produce a closer employer-provider arrangement. He identified a further problem in user choice as the possibility that group schemes could become training providers by being recognised as Registered Training Authorities thus creating a conflict of interest as the group scheme would then become both the employer of the trainee and the organisation recommending themselves as the most appropriate training provider.

# 9 Conclusion

This survey has focussed on the literature which dealt principally with policy developments in the training reform agenda from the late 1980s into the early 1990s. Literature on the policy developments following the change of Federal Government in 1996 has been limited, but included where available. Whilst some parts of this review has strayed into areas which border on commentary of the evaluation of operational issues relating to the efficiency of the delivery of vocational education and training, or the efficiency of its objectives, it must be emphasised that this is not a central concern to the present project.

Two salient points emerge from the survey of literature dealing with the development and implementation of training reform in vocational education and training. Firstly, there is limited legal commentary and this has been chiefly concerned with the operation of laws of general application to all education sectors, such as anti-discrimination law and trade practices law. Further, as far as Commonwealth, State and Territory law regulating the financing, organisation and delivery of vocational education and training is concerned, there is only limited commentary and this does not generally examine law against the regulatory standards of consistency, implementation, completeness, rationality or transparency.

There is, however, extant commentary on vocational education and training policy written from the perspective of various non-legal disciplines, and this commentary has been valuable to the purpose of this project in that it helps to identify those policy areas which are at least to some extent problematic in their implementation. This commentary includes general critiques of training reform and the critiques of specific issues in training reform such as the tension between national and State and regional and local interests, the training market concept, funding policies, competency-based training, and access and equity issues. In several respects these various issues pertain also to the legal and institutional framework with which this report is directly connected.

As we have noted, these issues arise in connection with the key objectives of the national vocational education and training strategy. Accordingly, they form the basic organising basis for the substance of this report.

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# A survey of policy relating to VET, 1992–1998

## 1 Introduction

THE SURVEY OF policy in this chapter focusses on the period 1992–1998. Policy development in the period prior to this has largely been dealt with in Chapter Two, Historical overview. However, it is important to note that 1987 was a critical year in the development of vocational education and training policy, and that some discussion of the period going back to that year is necessary by way of a descriptive background to the years immediately under review.

The year 1987, marks the publication date of *Australia reconstructed*[1] which was a founding document in the promotion of reform in the contemporary education and training sector. It was also the year that saw the formation of the Department of Employment, Education and Training as a Ministerial responsibility in the government of the Commonwealth of Australia.[2] This saw the separation of employment and industrial relations as policy areas, and the amalgamation of employment, education and training into a single department.



Several other influential documents also appeared in the education and training policy field from about this time. These included *Skills for Australia* in 1987,[3] followed by *A changing workforce*,[4] *labour market reform: An industrial relations agenda*,[5] and *Industry training in Australia: The need for change*[6] all published in 1988. Coupled with the developments mentioned above, these events were to set the pattern for policy in vocational education and training in the years to come.

Until the 1980s, Commonwealth influence in vocational education and training had been minor compared with that of the States and Territories. The development of Commonwealth interest in education and training to that time has been considered earlier in this report in Chapter Two, Historical overview. However, particularly from 1987 onwards, Commonwealth influence in vocational education and training reached new heights with government announcements and policy statements directly linking vocational education and training with the concerns of national economic development and prosperity. In

1992 events culminated in a Ministerial Agreement between the Commonwealth and all States and Territories to establish the Australian National Training Authority (ANTA). The events which led to this development will be dealt with in more detail later in this chapter (see below section 2.3.1). The formation of ANTA effectively gave the Commonwealth a central role in vocational education and training policy in all States and Territories. However, this arrangement could survive only whilst the States and Territories continued to support what was a system based on co-operation and consensus. In return for supporting ANTA arrangements, the States and Territories were provided with access to Commonwealth funds which, in 1996, represented approximately one quarter of the total national vocational education and training budget and approximately one third of the total government contribution to that budget which is also funded from other sources such as student fees.[7] The access to Commonwealth funding was based on the condition that the States and Territories achieved targets which were established by agreement through ANTA.

Despite political change, and jurisdictional squabbles between State and Territory and federal governments, policy development in vocational education and training since the period of the late 1980s has been quite consistent. Generally speaking the agenda has consistently settled upon policies associated with three major goals: (i) the development of skills to underpin economic growth and transformation; (ii) the improvement of opportunities for those who are disadvantaged in the labour market; and, (iii) the production of a more efficient and productive allocation of resources in vocational education and training through the development of market mechanisms, and greater reliance on the contribution of industry and individuals to the funding of vocational education and training.

The aim of this chapter is to present a survey of this policy development. To this end, the material focusses on major policies, and it does so in a chronological fashion. It is intended, principally, to point to key areas of policy development which form the basis for the legislative framework and legislative change outlined in the succeeding chapter. Thus, the account is selective and basically descriptive in purpose. It was not proposed to undertake an examination of the success or otherwise of the policies described, nor to investigate them from a critical perspective, other than drawing conclusions from the 'fit' between policy and law. That process is undertaken in Chapter Six, Vocational education and training law and policy: An examination.



## 2 Policy development

In the period following 1987, the co-operative approach of the several Australian governments gave rise not merely to a *national* policy approach to vocational education and training, but also to a structure comprised of numerous government bodies giving effect to the policies emerging from the national focus.

The following survey provides a chronological listing and brief examination of these developments under three sub-headings: (i) vocational education and training institutions; (ii) vocational education and training policy documents; and (iii) vocational education and training policy initiatives.

## 2.1 VET institutions

In 1987, the Department of Education, the employment division of the Department of Employment and Industrial Relations, the Office of Youth Affairs, and the TAFE section of the Commonwealth Tertiary Education Commission were subsumed into the Commonwealth Department of Employment, Education and Training.[8] The formation of this single department, which was responsible for policy in employment, education and training, indicates the Federal Government's belief that there was an important relationship between these policy areas, and that bringing their function into a single agency offered an improved opportunity to co-ordinate policy development.

In 1988, on the recommendation of a government appointed task force, the National Board of Employment, Education and training (NBEET) was established as a statutory body under the *Employment, Education and Training Act 1988* (Cwth)to provide co-ordinated, independent advice to the Minister for Employment, Education and Training.[9] To assist NBEET a number of councils were established including the Schools Council, which was responsible for providing advice on primary and secondary education, the Higher Education Council, which was responsible for providing advice on higher education, and the Australian Research Council, which was responsible for providing advice on, and co-ordinating, national research priorities and policy.[10] Of particular interest is the Employment Skills Formation Council (ESFC) which published a number of reports which were influential in vocational education and training policy development.[11]

In April 1989, the Minister for Employment, Education and Training convened a special conference of Commonwealth, State and Territory Ministers with responsibility for vocational education and training.[12] This group became known as the Ministers of Vocational Education, Employment and Training (MOVEET). The importance of MOVEET was that it represented a formalised and collaborative approach to the consideration of national issues relating to vocational education and training.

At its April 1989 meeting, MOVEET agreed to support and accelerate the adoption of competency-based training (CBT) (see below in this chapter, section 2.3.1) and also moved to establish the National Training Board Ltd (NTB). The NTB was established under a memorandum of understanding between Commonwealth, State and Territory Ministers responsible for vocational education and training.[13] The main role of the NTB was to consult with industry to endorse National Competency Standards (NCS). These would be the basis

upon which vocational education and training programs were to be developed, delivered and assessed. There was an endeavour to ensure that all vocational education and training curriculum was based on the NCS and initially this responsibility fell to the Australian Committee for Training Curriculum (ACTRAC) which developed national curriculum.[14] A further role of the NTB was to align competencies to the Australian Standards Framework (ASF), a system of work-related competency levels which is discussed in greater detail later in this chapter (see below section 2.3.1).

In 1992, the Prime Minister released his government's *One Nation* statement,[15] which described its program to restore prosperity and create 800 000 new jobs.[16] Amongst other measures the Commonwealth offered in *One Nation* to 'take full funding responsibility for TAFE and vocational education and training'[17] with promises of triennial funding and sustained growth. The new system would be developed in 'full consultation with participating States and Territories, and with industry [to progress] the national agenda for training reform'.[18] Under the proposals, State and Territory governments would retain responsibility for the management and administration of vocational education and training.

This offer was rejected by the States, and, as a compromise, the several Heads of Government in Australia agreed to the formation of the Australian National Training Authority (ANTA), which came into being with the passing of the Commonwealth Government's *Australian National Training Authority Act 1992*. The details of that Act, and the ANTA Agreement which sustained its purposes, are discussed in Chapter Five, A survey of the legal regulation of vocational education and training.[19] Broadly speaking, the functions of ANTA were to 'advise State and Commonwealth Ministers on appropriate policies and mechanisms to move towards a more national focus on vocational education and training'.[20] The operational framework for ANTA is found in the ANTA Agreement which is a schedule to the Act. In general terms the Agreement identifies the objectives, framework, key planning instruments, roles and responsibilities of key parties, main decision making processes and funding arrangements associated with the scheme.[21]



The Australian National Training Authority (ANTA) became operational in 1994. The peak body under the arrangement is a Ministerial Council (ANTA MINCO) which is composed of the relevant Ministers from each State and Territory and the Commonwealth Minister for Employment, Education and Training. The Commonwealth acts as Council chairperson. The ANTA MINCO essentially replaced the function of MOVEET and in 1994, the Australian Education Council, and MOVEET combined to form the Ministerial Council on Employment, Education, Training and Youth Affairs (MCEETYA). This body is a cross sectoral forum encompassing all sectors of education and training, employment and youth affairs. ANTA MINCO is not subordinate to MCEETYA which has a broader role.[22] ANTA MINCO delegates operational issues to the ANTA Board which is composed of industry representatives. The Board is

responsible for providing advice to ANTA MINCO, establishing strategic policy and national objectives and priorities.

The ANTA Agreement recognises that State and Territory Ministers are responsible for vocational education and training in their own jurisdiction but asserts that State and Territory policies must be consistent with those agreed by ANTA MINCO. The Agreement also identifies State Training Agencies as distinct bodies in the context of a national training system with accountability to the relevant State or Territory Minister and responsibility for vocational education and training within their own jurisdictions.[23] State and Territory governments direct their funds for training to ANTA, and, following consultation, ANTA redirects funds back to the States and Territories with an additional amount from Commonwealth funds, provided that agreed targets for the quantity and profile of training have been achieved.[24]

The ANTA arrangement extends to industry a central role in the development of vocational education and training policy.[25] Under the ANTA Agreement, ANTA is required to consult with Industry Training Advisory Boards (ITABs) which are composed of employers and union representatives. These bodies are intended to represent industry requirements in vocational education and training by providing advice at both the national and State and Territory levels on policies, priorities and training profiles which identify the quantity and nature of training which are to be funded from government sources.[26] Many ITABs were also recognised by the NTB as bodies which were responsible for establishing competency standards. Through this mechanism, industry was central to the development of competencies used in the delivery of vocational education and training.[27]

In 1995, the combined functions of the NTB in establishing NCS, and the ACTRAC in developing national curriculum for vocational education and training, were transferred to the Standards and Curriculum Council (SCC) which brought these functions into a single agency under the control of ANTA.[28] Following the election of the Federal Liberal-National Party Coalition Government in February 1996, the SCC was replaced by the National Training Framework Committee (NTFC) which reflected the new government's intention to continue reform in the vocational education and training system.[29] In particular, the NTFC was expected to oversee the implementation of the National Training Framework (NTF) which brought together endorsed NCS as the basis for national qualifications, and attempted to ensure quality provision of vocational education and training through nationally consistent recognition arrangements under the Australian Recognition Framework (ARF). This development is described in more detail later in this chapter (see section 2.3.2).



## 2.2 VET policy documents

It is pertinent to begin a discussion of major documents promoting the development of a national policy in vocational education and training with

*Australia reconstructed*,[30] which was the result of a joint Australian Council of Trade Unions (ACTU), Trade Development Council mission to Western Europe. The ACTU was particularly concerned to examine countries which had overcome balance of payment constraints in ways which produced low unemployment, low inflation, and economic growth which was distributed in a relatively equitable manner.[31] The recommendations of the report were wide-ranging and the section on labour market policies contained important recommendations for education and training. In particular the recommendations promoted the pursuit of more active labour market policies for skill formation, job placement and the reduction of labour market segmentation rather than the provision of income support for the unemployed which hitherto had characterised the Australian situation.[32] It also recommended the following strategies: the development of tripartite industry plans;[33] the formation of a National Employment and Training Fund financed from a tax on companies to fund skill formation and training and general education of the workforce;[34] the development of an integrated five year program to guarantee that all 16 to 24 year olds had access to full time education; specific vocational training or productive employment;[35] labour market programs developed on a tripartite basis;[36] and programs aimed at increasing participation by young women in trades and other non-traditional areas of female employment.[37]

In the same year *Skills for Australia* [38] restated much of what is found in *Australia reconstructed* [39] and clearly articulated the government's view that education and training systems should play an active role in responding to the major economic challenges facing Australia.[40] Skills, competence, and skill formation were identified as central to the task of structural adjustment.[41] Education and training was expected to play a vital role in developing a labour force with broad-based, transferable skills and the capacity to meet the labour market needs of industry. Specific actions identified as being required included increasing participation in education and training; improving the flexibility of education and training systems to improve the quality, breadth and adaptability of skills acquired; improving the distribution and balance of the national education and training effort to meet the long-term needs of the economy and the labour market; and increasing private sector investment in training and skills formation.[42] Measures to integrate income support and labour market assistance were announced in the *Skills for Australia* document, as were measures to reduce the high degree of occupational segregation in labour markets and to improve the training opportunities for women.[43] This statement promoted a competency-based rather than a time-served approach to training.[44] With specific reference to the relationship between training and industrial relations it was stated that 'skill boundaries between the trades continue to be far too rigidly delineated [resulting in skills that] are often unduly narrow and poorly related to modern industrial needs'. However, it was also recognised that changes to the apprenticeship system could not proceed 'independently of wider industrial and legislative considerations'.[45]

The combined effect of *Australia reconstructed* and *Skills for Australia* was to demonstrate the direction which would characterise vocational education and training policy in the years to follow. In particular the policies they espoused included the following key developments:

- a more *national* approach to vocational education and training
- an emphasis on *skill formation*
- a system which met the *needs of industry*
- increased vocational education and training opportunities for *labour market entrants* and for retraining and upskilling

The two documents also acknowledged the related nature of industrial reform and vocational education and training policy.

These themes were further developed in other reports which followed. In 1988 *A changing workforce*[46] contended that industrial reform would allow training to be more broadly based and to adopt an approach which promoted multiskilling. This paper identified the lack of structured training in large numbers of occupations, particularly those which were traditionally female occupations. In keeping with earlier documents it recommended that vocational education and training should move from dependence on a 'time-served' concept to a 'competency-based approach' focussing on achieving specified standards of skill. The document also made the point that there should be greater emphasis on industry-based formal training provisions, and that industry investment in education and training should be increased.[47]

In 1988, in his foreword to *Labour market reform: An industrial relations agenda*,[48] the then Federal Minister for Industrial Relations identified award restructuring as a key to micro-economic reform. This document restated much of what was found in *Skills for Australia* and emphasised the need for a better trained, more broadly skilled, flexible workforce based on training at all levels from point of entry to retraining. National consistency in training standards and curriculum, and provision for the national accreditation of skills, were also identified as necessary changes. In 1988 also, *Industry training in Australia: The need for change*[49] was published. This discussion paper was circulated by the Minister for Employment, Education and Training as a further step in the process of reform which had been introduced to the education and training system.[50] The paper canvassed two broad approaches to increasing industry investment in training and skill formation. They were: (i) the collection of funds which would be redistributed to firms providing approved training; and (ii) setting obligations on enterprises to spend a minimum amount on training.[51]



Given the demands for an increased quantum of vocational education and training, it is not surprising that the role and nature of the public provision of training was also addressed in the period from 1987. In this context, the 1990 *Report of the Training Cost Review Committee* (the Deveson report)[52] found that the unmet demand for technical and further education was already high, and that as

a result of award restructuring and the development of a wider training culture this unmet demand would increase.[53] The report recommended that governments commit themselves to a steady increase in publicly funded TAFE activity and to taking action which would enable and encourage industry to increase its training effort. It was also recommended that TAFE should become more efficient and more entrepreneurial in its activities.[54] With respect to fees, the report found that there was no persuasive case for substantial individual contributions to meet the cost of TAFE. However, this was not to say that fees should not be charged for TAFE courses and it was recommended that the Commonwealth should consider removing restrictions of the levy of tuition fees for initial vocational or preparatory courses.[55]

As has been noted in Chapter Two, there had been a number of reviews and restructures of entry level training prior to the 1980s. In 1985, the *Committee of Inquiry into Labour Market Programs* (the Kirby report)[56] recommended the rationalisation of labour market programs and the establishment of the Australian Traineeship System (ATS). In 1991, *Skills training for the 21st century: A report on skills training*[57] was published by the House of Representatives Standing Committee on Employment, Education and Training. This document identified weaknesses in the apprenticeship system. These included the fact that apprenticeships encouraged rigid demarcations between trades and occupations and that they failed to encourage the development of a multiskilled workforce. It was also noted that traineeships in non-apprenticeship fields had not succeeded in attracting significant numbers of young workers in those occupations.[58] The report made 13 recommendations. These included the need to expedite the introduction of a training wage;[59] the need to reach agreement on a national framework for the recognition of training and credit transfer and articulation between educational sectors;[60] the need for the Commonwealth Government to assume primary responsibility for funding the public sector component of vocational education and training[61] and for the establishment of national registration procedures for private providers of training.[62] The Committee also supported the concept of integrating apprenticeships and traineeships into one entry-level training system, a theme which was progressed by the ESFC which subsequently published the *Australian Vocational Certificate Training System* (the Carmichael report)[63] in 1992. The Carmichael report proposed the further restructuring of apprenticeships and traineeships with the development of the Australian Certificate Vocational Training System (ACVTS) to consolidate these forms of training into a single system with multiple pathways to achievement.[64] The ACVTS proposed four levels of outcomes based on nationally endorsed competency standards aligned to standardised levels of work performance under the ASF. It also set targets for successful completion of Year 12 students at various levels of achievement.[65] It was proposed that accreditation of a program in a single State or Territory would result in national recognition, thus promoting the notion of a *national* system of training.

As demonstrated in the ACVTS, the competency-based approach was central to policy development. In 1991 and 1992, competency-based training had been further developed in *Young people's participation in post-compulsory education and training* (the Finn report)[66] and *Putting a general education to work: The key competencies report* (the Mayer report)[67] which recommended the development of key or generic competencies, and set targets for youth participation in training.[68] The implementation of the competency-based approach was promoted in higher levels of training in 1993 when *Raising the standard: Middle level skills in the Australian workforce*[69] recommended the integration of employment related key competencies into middle level courses (i.e. post-trade level courses), and proposed targets for participation of workers in their twenties.

In 1992, Prime Minister Keating released yet a further major statement *One Nation: The White Paper on employment and growth*[70] which described what the government intended to do to create jobs and a stronger economy. Significantly, the government offered to take full funding responsibility for the development of a new and expanded system of institutes of vocational education.[71] As described earlier in this chapter, this proposal resulted in the establishment of ANTA which became central in the development and implementation of vocational education and training policy. In the same year the *Common and agreed goals for vocational education and training* were developed by MOVEET.[72] These proclaimed that Australia's vocational education and training system aimed to provide an educated, skilled and flexible workforce to enable Australian industry to be competitive in domestic and international markets, and improve the knowledge, skills and quality of life for Australians, having regard to the particular needs of disadvantaged groups.[73] These aims are reflected in the objectives of the ANTA Agreement which may be itemised in the following way:

- a national system with agreed objectives, priorities, consistent national strategies and a network of providers delivering nationally accredited programs
- a close interaction between industry and vocational education and training providers so that the training system operates within a strategic plan that reflects industry needs
- an efficient network of publicly funded providers
- an increase in opportunities for target groups
- an improvement in cross-sectoral links between schools, higher education and vocational education and training



In 1994, *Working Nation*[74] committed the government to decreasing unemployment through economic growth supported by a revised social security system and the introduction of various labour market programs. In relation to vocational education and training, this document did little more than restate various policy initiatives espoused in previous policies. It advocated a vocational education and training system which:

- responded to industry concerns about the content and relevance of training and actively encouraged industry in determining the direction of training reform
- offered a variety of training pathways
- was based on an open and competitive training market with public and private providers
- provided disadvantaged groups with access to training
- concerned itself with what individuals could do as a result of training rather than how long they spent in training programs[75]

Also in 1994, the ANTA MINCO endorsed the first National Strategy for Vocational Education and Training, *Towards a skilled Australia* which supported these proposals.[76]

At the 1996 federal election, the Labor Government, which had overseen major training reform in the vocational education and training system since 1987, was replaced by a Liberal-National Party Coalition Government which placed its own emphasis on vocational education and training policy, but broadly maintained the policy direction which has already been described. In its first budget in August 1996, the Coalition Government announced that most labour market programs would be abolished.[77] This resulted in the discontinuation of a number of vocational education and training programs which were aimed at assisting people to enter the labour market.

Following an ANTA MINCO meeting in May 1997 Ministers released the annual *National Priorities* for 1998. These were:

- implementation of New Apprenticeships, including user choice
- expansion of market mechanisms
- implementation of the National Training Framework
- provision of greater opportunities and improved outcomes for under-represented clients
- securing value for public expenditure maximised
- achievement of training outcomes which met the needs of small business
- encouragement of a training culture within industry, including enhanced training for the existing workforce
- training to facilitate State/Territory development[78]

Whilst a new national *strategy* has yet to be released, its *objectives* have been released in ANTA publications. They are: equipping Australians for the world of work; enhancing mobility in the labour market; achieving equitable outcomes in vocational education and training; and maximising the value of public expenditure.[79]

Although the terminology was changed to some degree, and new mechanisms for achieving the objectives of vocational education and training introduced, much of what is found in the policies of the incoming government since 1996 was

not new to the vocational education and training system. Such significant new initiatives as there were included the implementation of the New Apprenticeship Scheme, and the National Training Framework. In addition, although the concepts of competitive tendering and user-choice had been discussed and explored at a national level prior to the 1996 election, the implementation of these policy initiatives was given a further boost in the May 1997 ANTA announcements.

## 2.3 Policy initiatives in VET

The development of a national system based on industry-developed competencies was central to reform of the vocational education and training system. It was the medium through which the vocational education and training system was able to develop in parallel with industrial reforms such as award restructuring and the movement towards multiskilling. It provided a mechanism for acknowledging workers skills (irrespective of how they had been acquired) in order that they could be aligned to levels of pay developed by industrial tribunals. The competency-based approach also provided a means for developing a nationally consistent system of vocational education and training credentials. To support this national approach, the policies of the late 1980s endeavoured to secure reforms which would produce a system where the providers of vocational education and training and the outcomes of training and education, would be nationally recognised, and would address the needs of those disadvantaged in the labour market, particularly the young unemployed.

Finally, funding of these reforms was also a matter of concern. Policy development saw the emergence of the concept of the 'training market' which aimed to increase the efficiency and diversity of training provision, and increase the contribution of individuals and industry to training. In the following sections of this chapter these policy initiatives are developed in more detail.



### 2.3.1 Competency-based training and recognition of training outcomes

In November 1990, MOVEET committed the States and Territories to competency-based training (CBT) and recommended the formation of the NTB.[80] The main role of the NTB was to consult with industry in order to develop and accredit National Competency Standards (NCS). These were described as the 'benchmarks for the emerging national system of vocational education and training',[81] specifying the 'knowledge and skill and the application of that knowledge and skill to the standard performance required in employment'.[82] A further role of the NTB was to align competencies to the Australian Standards Framework (ASF), a set of eight competency levels which were intended to reflect work-related competency levels. Each level was differentiated according to the level of discretion, autonomy and freedom to act, the range of contingencies

to be dealt with and the complexity of the work, the level of responsibility and accountability entailed in the work, the complexity, depth and/or breadth of the knowledge base required, and competencies related to management functions and/or specialist functions.[83] The ASF was expected to act as a bridge between work-related competency and the vocational education and training certification system. However, the NTB noted that occupational classification should remain the prerogative of the industrial parties.[84] In 1992, credentials available as a result of successful completion of vocational education and training programs were linked to the Register of Australian Tertiary Education (RATE) and it was observed that this system of credentials did not align to the ASF and was not competency based.[85] In an attempt to resolve these issues, and to rationalise differences in credential systems throughout the nation, the Australian Qualifications Framework (AQF)—described as 'a comprehensive and national system of qualifications for all post-compulsory education and training'—was introduced on 1st January 1995.[86]

To ensure that curriculum used to deliver vocational education and training acted as a direct conduit between NCS and training outcomes, the Australian Committee for Training Curriculum (ACTRAC) was established to develop national curriculum founded on the NCS. As previously stated, the roles of the NTB and ACTRAC were brought under the control of ANTA with the merging of these bodies into the SCC in 1995.[87] Subsequently, the Standards Curriculum Council (SCC) was replaced by a business-led committee, the National Training Framework Committee (NTFC),[88] which was charged with responsibility of facilitating the implementation of the National Training Framework (NTF), a policy developed under the Federal Coalition Government in 1996. The NTF principally consisted of two elements, Training Packages and the Australian Recognition Framework (ARF).[89]

The introduction of Training Packages represented a significant policy shift reinforcing the central role of National Competency Standards in the vocational education and training system. Components of the Training Packages included those which required endorsement by the NTFC, and optional or non-endorsed components.[90] Endorsed components included a statement of national qualifications which could be achieved by demonstrating competency standards using the assessment guidelines described in the packages. By not including curriculum in the compulsory elements of training packages, the National Competency Standards are juxtaposed to AQF outcomes, thus providing opportunities for a more diverse provision of training programs with curriculum becoming an optional element. As a consequence of the removal of curriculum as a compulsory element in training arrangements, competencies might be more easily achieved outside of the traditional environment of training institutions which are used to dealing with curriculum issues. In principle, therefore, it would become a simpler process for competencies to be assessed directly in the workplace, thus promoting workplace training and assessment flexibility.

On the other hand, as a result of these changes any quality assurance for program delivery and outcomes which might have been provided by the compulsory use of accredited curriculum has been removed from the vocational education and training system.

### 2.3.2 National recognition and registration of training providers

In an agreement between the State, Territory and Commonwealth Governments, which sought to ensure a consistent approach to the recognition of training, credit transfer and the accreditation of training across the nation, the National Framework for the Recognition of Training (NFROT) came into effect in 1992.[91] NFROT was expected to provide for the 'national accreditation of courses, recognition of training programs, registration of providers of training and certification of achievement under the national vocational education and training system'.[92] This was the first manifestation of a national policy aimed at enhancing mobility in the labour market through national recognition and portability of training outcomes. However, on more than one occasion, ANTA and others recognised that whilst NFROT was a critical element in establishing a national training system, it had not worked satisfactorily and subsequently it was replaced by the ARF.[93]

The ARF introduced the concept of 'Registered Training Organisations' (RTOs). These organisations are able to seek registration to deliver a single service such as assessment in an enterprise, or operate across a range of services and products. RTOs may register as:

- assessment only organisations which do not deliver training
- organisations which provide training and assessment services or
- 'Quality Endorsed Organisations' which may undertake a range of accreditation functions in cases where endorsed Training Packages are not developed or do not meet the needs of the organisations customers[94]



Statements of attainment and other credentials obtained from one RTO must be recognised by all other RTOs.[95] If this provision is successful then all credentials will be transportable and nationally recognised. Under the ARF, an RTO registered in one State will also be able to operate in any other State or Territory without having to undertake a further registration process.[96] Whilst this provision allows a provider to operate nationally, it does not automatically provide access to government funds which are allocated by the States and Territories.

### 2.3.3 A unified entry-level training system

A number of employment and training programs had been introduced in the early 1970s and these were reviewed in the 1985 *Kirby report*,[97] which introduced the Australian Traineeship System (ATS). The ATS was intended to provide an

entry point for employment for young people of 16 to 18 years who had not completed Year 12 in secondary school. Trainees were provided with five days employment, including two days release to attend at a TAFE college, for a minimum of 13 weeks. Training in non-trade areas which traditionally had little provision for training was to be introduced.[98] In 1992, the *Carmichael report* [99] advocated the establishment of the ACVTS. This system envisaged the consolidation of various types of traineeships, apprenticeships and institutional-based training into a single scheme. The aim was to extend training to those who had not had an opportunity to participate in training, so that the Australian workforce would become more skilled and productive, and consequently more internationally competitive.

The New Apprenticeship System (NAS) was initially announced under the banner of the Modern Australian Apprenticeship and Traineeship System (MAATS) in March 1996.[100] It replaced the ATS and ACVTS which had failed to achieve the targets for reform set in these programs.[101] The NAS attempts to make apprenticeships and traineeships more accessible and flexible, and to increase the range of training provision beyond occupations covered by already established apprenticeships and traineeships. The NAS also provides the opportunity for part-time apprenticeships at secondary and tertiary levels, and removes age restrictions and the notion of time-served to complete an apprenticeship. In addition, new apprentice and trainee wages can be calculated on the ratio of time spent working and time spent in training either through awards or Australian workplace agreements or certified agreements.[102] The NAS goes further than the ATS and ACVTS in proposing that training through new apprenticeships should be available to cover all vocational education and training levels from AQF 1 to AQF 6 (Advanced Diploma).[103]

The NAS brings together a number of the policies including competency-based training, the National Training Framework (Training Packages and the Australian Recognition Framework), competitive tendering and user choice. The defining characteristics of New Apprenticeships are described by ANTA as a training agreement signed by the employer and apprentice or trainee, and a negotiated training program leading to a nationally recognised qualification, paid work and structured training.[104]



It was agreed by the ANTA MINCO that the notion of declared vocations or callings should be discontinued as part of the NAS, that user choice (see below in this chapter section 2.3.4) would be introduced as a central element of the NAS, and that government funded training in NAS should be allocated by competitive tendering. The adoption of these policies meant that, in principle, government funding for NAS would be opened up to private as well as public providers, and enterprises would be able to select who provided publicly funded training for new apprentice and trainees. However, in implementation, NSW reserved its decision on user choice, and chose to retain the declaration of vocations[105]

claiming that it would be able to implement the NAS within its existing legislation and policy.[106]

Documentation associated with the NAS demonstrates that this also attempts to eliminate the differentiation between apprentices and trainees. However, apprenticeships continue to be described as training arrangements which lead to a trade qualification, and traineeships are described as training arrangements which lead to non-trade qualifications, thus maintaining the distinction between traditional apprenticeships and other forms of training under the NAS.[107]

### 2.3.4 The 'training market'

The concept of a competitive training market emerged during the years of the Federal Labor Government. For example, *Skills for Australia*[108] announced that funds for capital grants and equipment grants would be allocated on the basis of competitive bidding.[109] The same statement announced a restructuring of labour market programs which would be open to competitive bidding by TAFE and private providers.[110] The Training Costs Review Committee's *Deveson report*[111] promoted a more entrepreneurial approach for TAFEs and more competition in the promotion of training. In *Towards a skilled Australia*,[112] ANTA identified opening up of the training market, allocation of more funding on a competitive tendering basis, and choice as to who provided training as part of the strategic framework for vocational education and training. In 1995, ANTA announced that all States and Territories had been engaged in allocating 30 per cent of Commonwealth growth funds for competitive tendering,[113] and user choice was to be a key feature of the vocational education and training system with the aim of achieving greater client choice in the purchase and delivery of training.[114] These developments leave little doubt that the vocational education and training system was moving towards a more competitive training market. In particular, user-choice and competitive tendering were policies which were intended to create a more direct relationship between the user and provider of vocational education and training and to increase the efficiency of the system and ensure value for public expenditure.



The ANTA MINCO endorsed the principle of user choice in late 1994 and pilot schemes were conducted in 1996-1997. The objective of user choice was to increase the responsiveness of the vocational education and training system in meeting the needs of clients by encouraging a direct market relationship between individual providers and clients, and by placing decisions about the most appropriate provider of vocational education and training, and the nature of the training program, in the hands of the client.[115] In July 1996, it was reported that ANTA MINCO had agreed to the progressive implementation of user choice during 1997 and to full implementation for off-the-job training for apprentices and trainees from 1 January 1998.[116]

Two further initiatives are worthy of mention in this survey of policy. These are first, the concept of third-party access and secondly, the concept of a

purchaser-provider split in the provision and acquisition of vocational education and training services.[117] In conjunction with user choice and competitive tendering, these ideas are intended to consolidate an open and competitive training market.

Third-party-access may best be described as the provision of access to publicly funded infrastructure by private providers in an attempt to increase competition in the provision of vocational education and training. In early 1997, ANTA MINCO agreed that third-party-access to publicly funded facilities was desirable and that this would be pursued within the States and Territories.[118] It has been reported, however, that no State or Territory training authority is developing this policy.[119] The purchaser-provider split model describes the purchaser as the agent who decides what will be provided, and the provider as the agent who delivers the outcomes or outputs. This model is based on the principle that a public sector manager, such as a State Training Authority which manages public assets and purchases training from a range of providers, may have a conflict of interests in undertaking the two roles.[120] It is understood that at this time, Ministers have agreed that a purchaser-provider split is desirable within the user-choice principle, and that this will be pursued at the State and Territory level.[121]

# 3 Conclusion

Although the mechanisms for achieving particular outcomes have varied from time to time, and from jurisdiction to jurisdiction, policy themes in the field of vocational education and training have remained remarkably consistent at a national level since 1987. Inevitably some difficulties arise from the co-operative nature of the ANTA arrangements in a federal system and some of these have been noted. However, in general the States and Territories have individually made a commitment to, and implemented, national policy at their own level of government.

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Commonwealth policy has endeavoured to develop a national system of vocational education and training which allows for the specific needs of States and Territories, is industry led, equips Australians for the world of work, provides maximum value for public expenditure and increases investment in training by industry, and improves the participation of disadvantaged and under-represented groups.

Our analysis suggests that the policy framework which has been developed to achieve these aims is generally comprehensive. Interviews with thirty-one experts drawn from a range of departments, authorities and institutions who were considered to be experts in the field of vocational education and training generally confirmed this conclusion.

However, the interviews also confirmed our conclusion that there were a number of instances where policy has failed to transfer into practice in a

uniformly successful manner. These are, however, matters relating to policy *implementation* rather than policy development. These matters are considered in detail in the content of Chapter Six of this report, Vocational education and training law and policy: An examination.

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# A survey of the legal regulation of VET

## 1 Introduction

HISTORICALLY, THE UNDERLYING theme in the development of the legal regulation of vocational education and training in Australia has been the perceived need to develop the national economy. State intervention during the second half of the nineteenth century resulted in legislation which provided for the establishment and regulation of colonial systems of compulsory elementary education. During the twentieth century this State intervention was extended by the development of the principal Education Acts in the States to cover the organisations of post-compulsory education systems, which included technical schools and senior technical colleges. Thus, education legislation, which is primarily concerned with establishment, organisation and management of public education institutions, is an important category of law for this survey of the legal regulation of vocational education and training. However, this education legislation, although similar in its purposes, is not identical in the models of institutional organisation established by the statutory framework in the several Australian jurisdictions. This is a consequence of the different historical, geographical, economic and political traditions in the various jurisdictions.



However, intervention by the State in the provision of public education institutions was not the only means of State intervention in the provision of vocational education and training. There was State regulation of apprenticeship in the Australian colonies during the nineteenth century, which was further developed during the twentieth century in two ways. On the one hand regulatory control of apprenticeship was included in the industrial relations legislation of the States and Territories, and in the federal industrial relations jurisdiction through the exercise of the Commonwealth's powers of conciliation and arbitration. On the other hand, there was significant development of dedicated apprenticeship legislation, and of the relevant provisions of the industrial

relations legislation, to regulate, not only the employment conditions for the practical training of apprentices, but also the conditions under which apprentices received theoretical training. This meant there was a need for consonance between the dedicated apprenticeship legislation and the provisions relating to apprenticeship in industrial laws. This aspect of the regulation of vocational education and training fell squarely within labour law, and it now constitutes another key category of the law relating to vocational education and training. A further notable feature of this category of legislation has been that it regulated the vocational education and training only for those trades and occupations which were declared to fall within its scope.

Within the last half-century, a further aspect of the intervention of the State in the regulation of vocational education and training has been the exercise of Commonwealth financial power to influence the development of national policies in education generally, albeit that constitutionally education is a power which remains with the States and Territories. From the 1970s the exercise of Commonwealth power in the vocational education and training sector has increased significantly. A particular catalyst for this growth was the need to attempt to resolve the problems of unemployment from the mid-1970s. This development has resulted in the development of Commonwealth education legislation, which is related to the development of policy and the provision of finance for the vocational education and training sector. It has also led to legislative change in industrial relations law, both federal and State, to maintain the practical consonance between vocational education and training and the formation and development of workplace skills. A third consequence has been the development, in both the Commonwealth legislative framework and in the State and Territory legislative frameworks, of statutory structures to facilitate the co-operative development of a National Training Policy and the use of Ministerial executive powers to implement agreed policies. This development reflects the constitutional reality that although the development of a National Training Policy for the provision of vocational education and training could be driven by the use of the Commonwealth's financial powers, the Commonwealth lacks constitutional authority to implement it unilaterally.



In this survey of the legal regulation of vocational education and training, the examination of these various categories of law has been organised to reflect the effects of the influences on their development. In the introduction, the constitutional context of law relating to vocational education and training is examined, and some general characteristics of the Commonwealth legislation relating to vocational education and training and of the State and Territory legislative frameworks for the regulation of vocational education and training are noted. In part two of the survey the statutory framework for the National Training Policy is examined in some detail, firstly, the Commonwealth legislation and then the State and Territory legislation. Part three of the survey covers the State and Territory legislation relating to the regulation of the public providers of

TAFE, including regulation under university statutes and the regulation of Adult, Community and Further Education providers. Part four of the survey briefly describes the dedicated statutory bodies which deal, in the State and Territory training systems, with the accreditation of courses and the registration of providers, and other statutory advisory bodies, including industry training advisory bodies.

Part five of the survey deals with the regulation of apprentices and trainees. The Commonwealth legislation relating to apprenticeship is examined, as are federal-State relations in the law dealing with the regulation of apprentices and trainees. The survey provides a detailed description of the current State and Territory legislation which regulates apprenticeships and traineeships, and then examines the development of that legislation to accommodate the New Apprenticeship System. The current relationship between apprenticeship legislation and State industrial law is also described, and regulation of vocational or practical industry placements outside the apprenticeship system is examined for those jurisdictions where such placements are regulated by statute.

The survey then examines fairly briefly, in parts six and seven, other areas of federal and State law, the legislative policies of which impinge upon the provision of vocational education, namely competition legislation and vocational education and training, and anti-discrimination law, and finally, recent developments in federal social security laws, which facilitate the implementation of policies relating to access and equity in the vocational education and training sector, are noted.

## 1.1 The constitutional context

By the mid-1990s the current legislative framework for the regulation of vocational education and training (VET) and for the development of a national training policy was in place in the Australian federal jurisdiction and in the States and Territories.[1] How this regulatory framework operates in practice is determined by its constitutional context. The *Constitution Act 1900*, an act of the Imperial Parliament at Westminster, provided the blueprint for the establishment of the government of the Australian Commonwealth. The federal compact was reached between the six self-governing sovereign Australian colonies, and approved at referenda during the 1890s. Significantly, the powers to change the Constitution were vested in the Australian people and not in the Imperial Parliament at Westminster. The Constitution provided for the fundamental matters relating to the governance of the new federation: the Parliament and its powers, the Executive, and the legal relationships of Australian federalism as well as the distribution of financial powers.



The federal compact provided that a few powers, for example that relating to Commonwealth territory, were to be exclusively exercised by the new Federal Government. Other powers, notably those listed in s 51 as being matters upon

which the Federal Government could make laws 'for the peace, order and good government of the Commonwealth', were powers to be shared concurrently with the States. Any other powers remained exclusively with the States. The power to make laws with respect to education was not included in s 51 and was among the powers which remained exclusively with the States. This situation had not changed by 1998.

However, it has been noted in the discussion of the historical background to the development of the legislative framework for the regulation of VET that the involvement of the Commonwealth Government in all sectors of education, including the VET sector has grown since 1945.[2] This has occurred chiefly through the exercise of the Commonwealth's financial powers, the appropriations power in s 81 of the Constitution and the grants power in s 96. It can probably be fairly said, without exploring the development of Australian constitutional law, that during the first century of Australian federation, the fiscal power of the Commonwealth has become far stronger than that of the States and Territories. Consequently, by providing additional supplementary funding for the States' and Territories' educational activities, the Commonwealth Government has been able to influence the development of policy in relation to education. It must also be remembered that part of the constitutional context of the Commonwealth influence on education policy lies in the 1946 amendment to the Constitution, which resulted in the inclusion in s 51 of placitum (xxiiiA), which *inter alia* enabled the Commonwealth Government to provide benefits to students. This has been another legislative source of federal influence on educational policy, including the policy relating to VET, in Australia during the past half century.

Finally, the commentary on the constitutional context would not be complete without noting that the practice of Australian federalism has given rise to certain models of legislative frameworks which are developed by agreement between the Commonwealth and the States and Territories. For example, under s 51(pl xxxvii), which enables the parliaments of States to refer a matter to the federal parliament to make a law about it, 'but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law', the Federal Government and the State and Territory governments have passed virtually identical Mutual Recognition legislation, which provides for mutual inter-jurisdictional recognition of goods and services across State and Territory boundaries. The adoption of the National Competition Policy, and the inclusion in the Commonwealth *Trade Practices Act 1974* of the competition policy provisions has also given rise similarly to the State and Territory Competition Policy Reform legislation, which is another example of the use of this model of legislative framework.

## 1.2 The Commonwealth legislation relating to VET

In the federal jurisdiction, the legislative instruments used to provide for the regulation of vocational education and training are statutes. At the time of writing, there are no subsidiary legal instruments, that is regulations or statutory rules made under these statutes. However, the effective implementation of these laws may well depend, variously, upon the use of administrative guidelines within the relevant government department or authority, guidelines which are published for the guidance of those who are the beneficiaries of the law, information provided to publicize the introduction of particular policies, and where tendering for the provision of services is used, on the terms and conditions of the contractual arrangements entered into by government and the successful tenderers. In the United Kingdom context, these materials have been characterised as 'leaflet law', which, because they are concerned with the implementation of statutes, may affect how the rights of individuals under a particular statute are interpreted in practice, but which, however, do not receive the parliamentary scrutiny required for statutory rules and regulations.[3] However the precise nature and status of this type of material in Australian labour law remains an unexplored issue. It may also be noted that Ministerial orders, or declarations, made under the provisions of the legislation, constitute the exercise of executive power, which is given by the Parliament to facilitate the administration of the legislation, and these Ministerial orders or declarations may also be used in the implementation of the legislation.[4] Generally, these legislative instruments may be thought of as quasi-legislation.[5]

The Commonwealth legislation relating to VET can be classified in three broad categories. There is the legislation which has as its prime objective the establishment of the federal legislative scheme relating to the National Training Policy. The current principal federal Acts which are directly concerned with the regulation of VET are the *Australian National Training Authority Act 1992* and the *Vocational Education and Training Funding Act 1992*. The purpose of the former Act is chiefly concerned with the development of federal administrative and advisory structures which assist in the formulation of the National Training Policy. The latter Act is chiefly concerned with the quantum of federal funding to be disbursed to the States and Territories for VET. These Acts operate in tandem. Although it was formerly of considerable relevance, it is now problematic whether or not the *Employment, Education and Training Act 1988* should be included in this category, but the final format of the amendment of this Act is presently unclear.[6]



Certain other Commonwealth laws include provisions which relate to the role of education and training in labour market regulation, although this role may not necessarily be the prime objective of this legislation. The *Workplace Relations Act 1996*, contains provisions which are relevant to the implementation of the policy relating to New Apprenticeships. The *Tradesmen's Rights Regulation Act 1946*, a

law of distinguished longevity and classical evolutionary development over half a century, deals with the recognition of trade training not undertaken within the framework of the traditional apprenticeship. Former policies relating to the labour market assistance, which provided for the provision of training to assist jobseekers, meant that certain provisions of the *Employment Services Act 1994* relating to the provision of unemployment benefits, created an operational interface between this legislation and education and training. However, a new corporatised and privatised system of assistance for jobseekers will become operational on 1 May, 1998, and it is presently not possible to comment upon the future development of this interface. Further, certain provisions of the *Social Security Act 1991*, the amendment of which is foreshadowed in the Social Security Legislation Amendment (Youth Allowance) Bill 1997, will also form part of the legal framework which governs the operation of VET.

Thirdly, there is other legislation which relates to the provision of services, which may also be relevant to the regulation of VET, namely, the Mutual Recognition legislation and the *Trade Practices Act 1974* and the State and Territory Competition Policy Reform legislation.

## 1.3 The State and Territory legislation relating to VET

Since 1901 the power to make laws relating to education has remained with the States and Territories. Consequently, it is the State and Territory legislation which provides for the advisory and regulatory structures for the provision of VET, which are essential to the development and implementation of the elements of the National Training Policy, including the National Training Framework and the New Apprenticeships. The legislative instruments used in the States and Territories include both statutes, and, in most jurisdictions, subordinate legislation, that is regulations or statutory rules, and declarations or orders, made under the various statutes. Materials which may be categorised as quasi-legislation may also be relevant.

*13.1*

As the exploration of the historical background to the VET legislation shows, the legislative frameworks in the States and Territories have evolved with regard to the particular traditions relating to the regulation of education in each jurisdiction, and, during the past decade, with regard to the movement towards the development of the National Training Policy.[7] Consequently, it is this legislation which deals with the constitution, powers and functions of State Training Authorities, the nomination of the State Training Agencies, the accreditation and recognition of registered training organisations, the role of Industry Training Advisory Boards, the regulation of the apprenticeship and traineeship system and the regulation of TAFE providers, both public and private. In some jurisdictions industry placement outside the apprenticeship system is also regulated. Other State and Territory legislation is also relevant to

the provision of VET. This legislation varies from jurisdiction to jurisdiction, but can include university Acts, the principal education Act, Acts relating to individual TAFE institutions, and legislative provision for adult, community and further education. In those jurisdictions which maintain their own industrial award systems (as distinct from relying on the federal industrial relations jurisdiction), that is New South Wales, Queensland, South Australia, Tasmania and Western Australia, provisions in the industrial relations legislation are of significance in the development of the current New Apprenticeships policy. Further, it may be noted that in those jurisdictions where competition policy is currently being applied to the operations of the VET sector, the principles of competition policy as set out in the competition policy reform legislation will be relevant. Finally, there is the issue of whether or not the State and Territory Mutual Recognition legislation, which *prima facie* might be relevant to the implementation of the mutual recognition principle underlying the National Training Framework and the Australian Recognition Framework, plays any part in the regulation of the VET sector.

A further important point should be noted. At the currency date for this survey, 1 March, 1998, the State and Territory legislation is a body of legislation which is in transition. It is a significant and relevant fact that the Parliaments of the States and Territories do not operate as a single entity in time, and do not have identical traditions either in the organisation of education or in the adoption of legislative structures to support the organisation of education. Consequently, when it is agreed under the Australian federal system that legislative changes will be made in the future to align legislation as between the Commonwealth and the States and Territories this does not necessarily mean that all the Parliaments will act at the same time to make these changes, or that the changes made will be identical in each jurisdiction. Hence, some legislation surveyed below is legislation which is potentially likely to be amended in some respects to reflect the current policy developments. Further, where legislative change has either been made before 1 March, 1998, or has been proposed in a draft consultation bill format prior to this date, the survey reveals that the changes will not necessarily be identical in each jurisdiction.



At 1 March, 1998 the core legislation governing the provision of VET in the Australian States and Territories is in a transitional phase with respect to a number of matters, for example, the implementation of the New Apprenticeship scheme, which provides for the discontinuance of 'declared vocations', and the application of competition policy to the operations of the public sector, which gives rise to the implementation of the principle of competitive neutrality and to the separation of the purchaser and provider functions. This requires that in relation to these matters the law as it is at 1 March, 1998 be described.

The second point, of considerable significance in relation to the provision of education in the several Australian jurisdictions, is that the socio-cultural context of the operation of legislation is not identical in the States and Territories. The

current socio-cultural context in each State and Territory has been formed by a variety of factors over time, and consequently traditions in the administration and provision of educational services, including VET, vary in a number of ways. Such factors may include historical, geographic, demographic and political influences. For example, as far as the regulation of institutions is concerned there is a continuum of organisational models. In some jurisdictions the tradition may be fairly characterised as favouring a more centralised model of operational decision-making, whereas in others more devolution in operational decision-making is favoured. Another example may be found in the approach adopted in establishing statutory bodies with determinative and/or advisory powers. Albeit that without exception in all jurisdictions the executive Ministerial power is overriding, whatever the scope of the functions of statutory bodies, the constitution of such bodies may be determined either by the use of the *ex officio* and representative model of membership, or by the model which includes both *ex officio* and members appointed by the exercise of Ministerial discretion, or by a third model in which the constitution of the membership is determined by the relatively unfettered exercise of the Ministerial discretion. Which approach is used will be determined by the policy of the executive government. Further, the policy in relation to the exercise of powers in the governance of each jurisdiction, that is whether policy is to be implemented by the exercise of legislative powers or executive powers, will determine whether the usual practice is to rely chiefly on subordinate legislation, that is regulations and statutory rules, to implement the policy of detail of the legislation, or whether the practice is to rely chiefly on Ministerial or executive orders, and on quasi-legislation, that is the development of guidelines and other informational materials, to provide for the flexible implementation of such policy. What these socio-cultural factors mean for the Australian State and Territory legislation relating to VET is that the culture of the implementation of legislation will vary from jurisdiction to jurisdiction in ways which a survey and analysis of the legislative text will not necessarily reveal.



There are, however, considerable similarities in core legislation relating to VET, however far the current transitional process has or has not proceeded. This legislation usually provides a statement of its objects, which usually cover both the regulation of the State and Territory VET system and the relationship between that system and ANTA. Even if there is no general statement of objects, other provisions in an Act may reveal the intention to provide for the relation with ANTA—for example, the provisions relating to the State Training Agency. Further, the objects of statutory bodies created under the particular Act are stated. The Acts also provide for the establishment, functions and powers of the State Training Authority, however named, and for other statutory bodies concerned with the systemic administration of the regulatory framework of VET in the particular jurisdiction. Other provisions will relate to the accreditation and registration of VET providers, the regulation of apprenticeships and traineeships, the regulation of private providers of VET, and the regulation and governance of

public providers of TAFE. However, the establishment of statutory bodies for ACFE, and the regulation and governance of those bodies, and the regulation of vocational or industry placement outside apprenticeships and traineeships is not provided for in all legislation.

## 2 The statutory framework for the National Training Policy

The statutory framework for the National Training Policy is built on both Commonwealth[8] and State and Territory legislation. Of fundamental importance in the statutory framework for the national training policy are the (Cwth) *Australian National Training Authority Act 1992* and the (Cwth) *Vocational Education and Training Funding Act 1992* and the following State and Territory legislation which regulates the public provision of VET. This legislation is currently, at 1 March, 1998, as follows:

**ACT:** *Canberra Institute of Technology Act 1987*
*Vocational Education and Training Act 1995*
*The Hotel School Act 1996*

**NT:** *Education Act 1979*
*Northern Territory University Act 1989*
*Northern Territory Employment and Training Authority Act 1991*

**NSW:** *Industrial and Commercial Training Act 1989*
*Technical and Further Education Commission Act 1990*
*Vocational Education and Training Accreditation Act 1990*
*Board of Adult and Community Education Act 1990*
*Board of Vocational Education and Training Act 1994*

**QLD:** *Vocational Education, Training and Employment Act 1991*
*Agricultural Colleges Act 1994*

**SA:** *Technical and Further Education Act 1975*
*Vocational Education, Training and Employment Act 1991*

**TAS:** *Vocational Education and Training Act 1994*
*TAFE Tasmania Act 1997*

**VIC:** *Council of Adult Education Act 1981*
*Vocational Education and Training Act 1990*
*Adult, Community and Further Education Act 1991*
*Royal Melbourne Institute of Technology Act 1992*
*Swinburne University of Technology Act 1992*
*Victoria University of Technology Act 1990*
*The University of Melbourne Act 1958*
*University of Ballarat Act 1993*

**WA:** *Vocational Education and Training Act 1996*
*Curtin University of Technology Act 1966*

## 2.1 The Commonwealth Legislation: The *Australian National Training Authority Act 1992* and the *Vocational Education and Training Funding Act 1992*

Section 3 of the *Australian National Training Authority Act 1992* states that its *objects* are:

> *(a) in conjunction with the States, to promote the development of a national vocational education and training system in accordance with the objectives set out in the Statement and*
>
> *(b) to promote that development in accordance with the planning and decision-making arrangements set out in the Statement*

In s 4(1), the definition section, the key features of the proposed national scheme and the key players who are to be responsible for the implementation of that scheme are identified: the *Australian National Training Authority (ANTA)*, the *Ministerial Council*, the *State Training Agencies*, and the *Industry Training Advisory Bodies (ITABs)*. The *Statement*—initially the statement entitled 'A national vocational education and training system' agreed on by the Commonwealth and the States in July 1992—is to be found in the Schedule to the Act. This was the Agreement made between the Commonwealth and the States and Territories in relation to the development of a national vocational education and training system, and describes in some detail the policy which the Act seeks to establish.[7] The operational link with the *Vocational Education and Training Funding Act 1992* is also clearly identified: *VET funding* is the 'money paid to the Authority under Part 3 of the *Vocational Education and Training Funding Act 1992*'.

The *Australian National Training Authority Act 1992* is the major legislative instrument for the introduction and implementation of the policy contained in the Agreement. The policy invokes consensual consultative arrangements between the Commonwealth and the States and Territories, but there is a clear hierarchy in authority in the decision-making processes. Executive power is paramount. The Ministerial Council—constituted by one Minister responsible for vocational education and training, from each State and Territory and the Commonwealth—which under cl. 13 of the Schedule is to 'develop and endorse agreed national objectives and priorities for vocational education and training' is clearly the most powerful of the key parties. Consultative processes are clearly to be the means by which ANTA and the State Training Agencies are to develop and implement strategic plans for the National Training System, but the power of final endorsement of those strategic plans is to rest with the Ministerial Council. ANTA is clearly intended to be the conduit for the disbursement of funds, but the Ministerial Council is to play the major role in the allocation of Commonwealth funds.

Part 2, ss 5–10 of the Act, provides for ANTA's establishment, its functions and powers, including its discretionary powers of consultation. Subsection 6(2) lists

its specific functions, which are indicative not only of the role ANTA is to play, but of the administration of the National Training System:

> *(a) to prepare draft national strategic plans for approval by the Ministerial Council*
>
> *(b) to give advice, and make recommendations, to the Ministerial Council regarding the amounts of funds that will be needed for the allocation by the Authority in respect of each year*
>
> *(c) to recommend to the Ministerial Council the principles to be applied by the Authority in the allocation of funds*
>
> *(d) to provide reports to the Ministerial Council on request by the Council*
>
> *(e) to join with the State Training Agencies in the development, according to the guidelines determined by the Ministerial Council, of State training profiles for submission by the Authority to the Council in accordance with the Statement*
>
> *(f) after consultation with State Training Agencies, to make recommendations to the Ministerial Council for more effective and efficient means of delivering vocational education and training*
>
> *(g) to promote and facilitate the maintenance of comprehensive national data on vocational education and training*
>
> *(h) subject to the directions of the Ministerial Council, to give advice, and make recommendations, to the Council in relation to matters within the functions of the Council*

Part 6 sets out the administrative provisions relating to ANTA. Division 1, ss 24–34 provide for the regulation of membership of ANTA, who under s 25 are to be appointed by the Governor-General on the nomination of the Ministerial Council. There is no fetter of representation on the exercise of this Ministerial discretion, and Division 2, ss 35–39 deal with ANTA's procedures, including the imposition of an obligation of the disclosure of interests by the members of the Authority. Part 7, ss 40–47 deals with the appointment of ANTA staff.

Part 3, ss 11–16 of the Act provide for the allocation and payment of funds in accordance with the directions of the Ministerial Council. Section 11 provides for the appropriation of funds by the Commonwealth for the Authority in addition to the funding provided under Part 3 of the *Vocational Education and Training Funding Act 1992*, and s 12 enables the Authority to receive payments from the States and Territories. Section 14A, inserted by the *Vocational Education and Training Funding Laws Amendment Act 1993*, enabled the Commonwealth Minister, in 1994 and 1995, to restrict funding payable by the Authority to a State, if in the Minister's opinion, the State has failed to comply with the Statement. This represented a unilateral exercise of power of financial inducement by the Commonwealth in that it provided for sanctions to encourage the adherence of the States and Territories to the policy and was to this extent a departure from the collaborative consensual model of the original legislation.

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Other provisions of this Act are typical of those in legislation relating to the establishment of statutory advisory bodies. Part 4, ss 17–18 deal with reporting requirements, Part 5, ss 19–23 deal with the Authority's finances, and Part 8,

ss 48–51, deal with miscellaneous provisions, including in s 49 the Authority's power of delegation, and in s 51 the Governor-General's power to make regulations, which under subs 51(2) 'must be in accordance with the recommendation of the Ministerial Council'. However, at the time of writing, no regulations have been made under the Act. It should also be noted that the provisions of Commonwealth *Financial Management and Accountability Act 1997*, the *Auditor-General Act 1997* and the *Commonwealth Authorities and Companies Act 1997* apply to the operations of ANTA. The latter Act imposes important duties upon *inter alia* members of statutory authorities that are established for public purposes and hold money on their own account, that is 'directors' under the Act, to act not only honestly but carefully and diligently in their work for an authority, and provides for civil and criminal penalties for breach of these duties.[10]

The *Vocational Education and Training Funding Act 1992*[11] is clearly intended to operate in tandem with the *Australian National Training Authority Act 1992*. The purpose of this Act is to provide for the funding of vocational education and training through ANTA. The Act has been amended each year to provide for the annual appropriation of funds, the quantum of which varies each year, although on occasion other amendments have been made. As noted above the *Vocational Education and Training Funding Laws Amendment Act 1993* introduced s 14A into the *Australian National Training Authority Act 1992*. The *Vocational Education and Training Funding Amendment Act 1994* provided for a revised s 9 which dealt with the general funds for allocation by the Authority, and added s 9A which provided for the allocation of addition funding for eligible off-the-job training in certain traineeship programs, which were then in existence. At the time of writing no regulations have been made under this legislation.

## 2.2 State and Territory legislation and the National Training Policy

### 2.2.1 The objects of State and Territory legislation

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The *objects* of any legislation should indicate the range of *substantive matters* to be dealt with in a particular Act. It is not unreasonable to expect that the State and Territory legislation relating to vocational education and training would certainly deal with the establishment and administration of vocational education and training within the particular jurisdiction, and given the contemporary policy concerned to promote the development of a national training system, it might be expected that reference to this policy would be included in the *objects* of the State and Territory legislation relating to VET. However, this is not uniformly the case. The (NT) *Northern Territory Employment and Training Authority Act 1991*, the (SA) *Technical and Further Education Act 1975*, the (SA) *Vocational Education, Employment and Training Act 1994*, the (NSW) *Technical and Further Education Commission Act 1990* and the (Tas) *TAFE Tasmania Act 1997* do not provide any statement of the objects of those Acts.

Further, the (ACT) *Vocational Education and Training Act 1995*, the (NSW) *Industrial and Commercial Training Act 1989* and the (NSW) *Vocational Education and Training Accreditation Act 1990*, and the (Vic) *Vocational Education and Training Act 1990* do not in the statement of their objects refer expressly to the development of a national training system.[12] Typically what these Acts do provide for in their objects is for the development and regulation of the particular State or Territory training system, or aspects of that system. Two examples will suffice. In the words of s 3 of the ACT Act the legislation is intended:

> *(a) to provide effective and efficient mechanisms for the planning, funding, co-ordination and evaluation of vocational education and training*
>
> *(b) to regulate vocational education and training in the Territory*
>
> *(c) to support quality assurance and best management practices in relation to all aspects of vocational education and training and*
>
> *(d) within the community, to encourage an awareness of the need for, and to promote the development of, vocational education and training that is relevant to industry*

Similarly s 1 of the Victorian Act provides that its main purposes are to establish the State Training Board and specify its powers and functions, to provide for the establishment of TAFE colleges as self-governing institutions, to provide for the establishment of industry training boards, to provide for the regulation of apprenticeships and other workplace training, to provide mechanisms for the accreditation of vocational education and training courses, and to regulate the practical placement of TAFE students undertaking work experience. Further objects are detailed in s 4(a)–(j).

However, the (WA) *Vocational Education and Training Act 1996* includes in the objects listed in s 4(a)–(f) in addition to those referring to vocational education and training within the State, those of meeting the State's obligations under national arrangements relating to vocational education and training, and of allowing 'for the operation of an open and competitive training market in this State'. Similarly the (NSW) *Board of Vocational Education and Training Act 1994* s 4 in providing that:



> *. . . the object of this Act is to establish the New South Wales Board of Vocational Education and Training as the body to be nominated by the Minister as the State Training Agency for the purposes of the Commonwealth Act . . .*

recognises in its objects the development of the National Training Policy. The (Qld) *Vocational Education, Training and Employment Act 1991* in s 3(a)–(i) provides comprehensively for the development of vocational education and training in that State, and in s 3(j) provides that a further object of the Act is 'to promote the development of a national vocational education and training system in accordance with the National Statement', which was included as a Schedule to this Act by the *Vocational Education, Training and Employment Amendment Act 1993*.[13]

## 2.2.2 The constitution of the State and Territory Training Authorities

Generally most of the State and Territory VET legislation provides for the establishment of the *State or Territory Training Authority*. These bodies are: in the Australian Capital Territory, the Vocational Education and Training Authority;[14] in the Northern Territory, the Northern Territory Employment and Training Authority;[15] in Queensland, Vocational Education, Training and Employment Commission;[16] in South Australia, the Vocational Education and Training Board;[17] in Tasmania, the Tasmanian State Training Authority;[18] in Victoria, the State Training Board;[19] and in Western Australia, the State Training Board.[20] However, in New South Wales there are a number of statutes which deal with technical and further education and the legislative scheme with regard to statutory bodies dealing with VET is rather more complex than in other jurisdictions. There are several statutory bodies.[21] As the Board of Vocational Education and Training, established under s 5 of the *Vocational Education and Training Act 1994* is the Board which has functions in relation to the development and implementation of the national system it can be considered in the context of this discussion of State Training Authorities.

The legislation provides for the membership of these statutory bodies, either by the exercise of relatively unfettered Ministerial discretion in Victoria and Western Australia,[22] or in New South Wales by a combination of *ex officio* and Ministerial appointments,[23] or in the Australian Capital Territory, the Northern Territory, Queensland, South Australia, and Tasmania by a combination of *ex officio* members and Ministerial choice of members representative of specified interests and/or organisations, which include some or all of employer associations, union organisations, industry training organisations, private providers of training and other education sectors.[24] It may also be noted that all the legislation contains various provisions relating to the procedures for the appointment of members, the termination of appointments, the filling of vacancies, the obligation of disclosure of interests by members, remuneration of members and the protection of members from liability for actions done in good faith in the course of their work as members of the relevant Authority.[25] These provisions are generally similar, but not identical, in their terms and scope, and are typical of those found in all legislation relating to the establishment of statutory authorities.



## 2.2.3 The powers and functions of the State Training Authorities

As is usual in the establishment of statutory bodies, whether advisory or determinative, the powers and functions are provided for in some detail. The roles the State Training Authorities are to play in the implementation of policies relating to VET depends upon the scope of their statutory powers and functions.

They have advisory functions on a range of matters relating to strategic planning for the provision of VET in the particular jurisdiction, and this generally includes the development of the State Training Profile and the development of the National System. In those jurisdictions where the legislative model is essentially that of the establishment of one major key authority, some State Training Authorities have accreditation and registration functions also, but in other jurisdictions these functions may be the responsibility of other statutory bodies.

In the Australian Capital Territory the *Vocational Education and Training Act 1995* s 6(1)(a)–(q) provide, *inter alia*, that the functions of the Vocational Education and Training Authority are to provide for VET in the ACT, to develop strategic plans and priorities, to manage the funding, to promote equity in access to and participation in VET and to provide advice to the Minister. Section 6(2)(a)–(j) provides for the Authority's functions when it is nominated as the State Training Agency for the Territory, and these focus on co-operation with ANTA in matters such as the provision of policy advice, the development of an annual State Training Profile, and the development of a draft National Strategic Plan. Section 6(a)–(y) of the *Northern Territory Employment and Training Authority Act 1991* detail the requirements that the Authority, in conjunction with employer and employee organisations, providers and government, should provide VET and develop VET policies for people generally and for those who need particular assistance.

In New South Wales the *Board of Vocational Education and Training Act 1994* s 6(a)–(l) provides that the Board, *inter alia*, is to advise the Minister on the development of State and National VET, to prepare, in collaboration with industry and VET providers, the State Training Profiles based on the National Strategic Plan for Ministerial approval, to liaise with ANTA and other State Training Agencies, and in conjunction with the Vocational Education and Training Accreditation Board, a statutory authority established under the *Vocational Education and Accreditation Act 1990*, to develop 'a co-ordinated and effective State system for the accreditation of courses and the registration of education and training providers'.

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In Queensland the *Vocational Education, Training and Employment Act 1991*, s 9 listed in some detail the functions of the Vocational Education, Training and Employment Commission. These included responsibility for advising the Minister, for determining policy, including policy as to the accreditation of courses and the recognition of training programs, for ensuring consistency in the nomenclature of awards, for consultation with other bodies and for the recognition of vocational education and training establishments as approved training organisations. The Commission is the State Training Agency for Queensland, and s 10 provides for its functions in relation to ANTA. In South Australia the *Vocational Education, Employment and Training Act 1994* s 9 provided for the functions of the Vocational Education, Training and Employment Board, including in s 9(1) a general advisory function, in s 9(2)(a)–(k) detailed specific functions, which *inter alia* relate to the preparation of an annual draft State

Training Profile, and in subs 9(2)(b), monitoring the provision of vocational and adult community education and training in the State and 'advising the Minister of the extent of compliance with, and any departures from, the National Strategic Plan or the State Training Profile'. Similarly s 7 of the Tasmanian *Vocational Education and Training Act 1994* detailed the functions of the Training Authority which include the provision of advice to the Minister, policy development, the oversight of the implementation of national policy agreements and the development of State Training Profiles consistent with the National Strategic Plan.

The Victorian State Training Board under s 9(1)(a)–(j) of the *Vocational Education and Training Act 1990*, as recently amended, has functions which include *inter alia* the provision of advice to the Minister on the development of vocational education and training in Victoria, about consistency of nomenclature of qualifications, about curriculum and about funding. Section 9A covers the functions of the Board as the State Training Agency, s 9B provides for its functions under the National Training Wage Award, and s 9C provides that:

> *. . . if the Board is declared an approving authority for the purposes of Part VIE of the Workplace Relations Act 1996 of the Commonwealth it may perform the functions and exercise the powers conferred on it by that Act.*

Under s 21 of the Western Australian *Vocational Education and Training Act 1996* the functions of the State Training Board include the preparation of the State Training Profile, the preparation of policies relating to the optimization of employment opportunities for people, the accreditation of courses and the registration of training providers, as well as advising the Minister on matters relating to strategic planning for the State training system. Under s 8(b) the Minister must approve the State Training Profile is required.

In all jurisdictions, the powers given to the State Training Authorities, and the provisions relating to the procedures those bodies are to follow in their meetings are typical of those usually accorded statutory bodies with advisory and/or determinative powers.[26] These provisions usually include a general power and powers in relation to specific functions and the procedural requirements for meetings. There may also be powers to establish committees and a power of delegation by the Authority.[27] Usually, the State Training Authorities have the obligation of consulting with other relevant bodies.[28] What is very clear in all the legislation is that all the State Training Authorities are required to act in accordance with Ministerial directions.[29]



## 2.2.4 The State Training Agencies

The role of the *State Training Agency* is a key component of the organisation of the National Training Policy because in each State and Territory it is the State Training Agency which is responsible for liaison with ANTA and for the co-operative development of protocols for the development and implementation of

National Training Policy. Different approaches are taken in State and Territory legislation to defining what is to be the State Training Agency.

In the ACT s 9 of the *Vocational Education and Training Act 1991* provides that for the purposes of the definition of 'State Training Agency' in s 4(1) of the (Cwth) *Australian National Training Authority Act 1992*, the Minister may nominate the State Training Authority as the State Training Agency for the Territory. Sections 4 and 8 of the New South Wales' *Board of Vocational Education and Training Act 1994* provide similarly for the Board of Vocational Education and Training to be nominated by the Minister as the State Training Agency.

In other jurisdictions the functions of the State Training Authority expressly include that of being the State Training Agency. This is the case under the Queensland *Vocational Education, Training and Employment Act 1991* ss 9(o) and 10. Similarly, the Victorian *Vocational Education and Training Act 1990* s 9A specifies the functions of the State Training Board in relation to ANTA. Section 9A(1) provides that the Board is the State Training Agency for Victoria under the National Statement. Section 9A(2) provides an indicative example of the statutory functions of a State Training Agency, which are:

> *(a) to provide data and advice to ANTA about the vocational education and training needs and priorities in Victoria and the funding implications of those needs and priorities*
>
> *(b) to advise ANTA about—*
>
> *(i) the development of vocational education and training policy and*
>
> *(ii) the development of a National Strategic Plan for vocational education and training and*
>
> *(c) to develop for ANTA a State Training Profile having regard to—*
>
> *(i) the planning parameters set by the Ministerial Council referred to in the National Statement and*
>
> *(ii) the National Strategic Plan referred to in that Statement*
>
> *(d) to ensure that vocational education and training in Victoria is managed and delivered having regard to the National Strategic Plan*
>
> *(e) to provide annual vocational education and training performance reports to ANTA*
>
> *(f) to perform any other function given to the Victorian State Training Agency under the National Statement*



Finally, s 9A(3) provides that in this section vocational education and training includes, adult, community and further education.

The legislation in the Northern Territory and in Tasmania does not expressly state that the relevant Authority is the State Training Agency. However, s 6(aa) of the *Northern Territory Employment and Training Authority Act 1991* does provide that the Authority must ensure that the Territory's obligations under the ANTA Act are complied with and work with ANTA to develop training profiles, and similarly the Tasmanian *Vocational Education and Training Act 1994* in s 7 and

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ss 10–13 clearly provide for the State Training Authority to carry out the functions relating to the development of State Training Profiles consistent with the National Strategic Plan. Nevertheless, s 5 of the Tasmanian Act establishes the conclusive authority of the Minister over the work of the State Training Authority, particularly in relation to the development of the State Training Profile and its submission to ANTA.

Different legislative arrangements are used in South Australia and Western Australia. In South Australia, s 4 of the *Vocational Education, Employment and Training Act 1994* expressly provides that the 'Minister is the State Training Agency contemplated by the Commonwealth Act', that is the *Australian National Training Authority Act 1992*, and s 5(1) provides for the functions of the Minister as Agency in terms which are very similar to, but not identical with, those of the Victorian Act noted above. Section 5(2) obliges the Minister to ensure that the vocational and adult and community education and training needs of the State are identified and met in a cost effective and efficient manner. Section 6 provides for the Minister's powers of delegation and the manner in which that delegation must be made. In Western Australia it is the government department administering the *Vocational Education and Training Act 1996* rather than the State Training Board which is the State Training Agency. Section 68(1) requires the Minister to nominate the department, as it is defined in s 5(1), as the State Training Agency for the purposes of the Commonwealth *Australian National Training Authority Act 1992*. Section 68(2) forbids any public training provider from making any application for or representation about the allocation of funding directly to ANTA without the approval of the chief executive of the department. However, s 8 of this Act provides that the Minister's functions include the approval of the State Training Profile.

In some State and Territory legislation there is an express conferral of functions on ANTA in relation to the particular State or Territory. The ACT *Vocational Education and Training Act 1995* ss 10–11, the Queensland *Vocational Education, Training and Employment Act 1991*, ss 59–60, and the Victorian *Vocational Education and Training Act 1990* ss 22A–22C confer functions on ANTA in relation to those jurisdictions and provide that ANTA has the necessary power to carry out its functions. However the *Northern Territory Employment and Training Authority Act 1991*, the New South Wales *Board of Vocational Education and Training Act 1994*, the South Australian *Vocational Education, Employment and Training Act 1994*, the Tasmanian *Vocational Education and Training Act 1994*, and the Western Australian *Vocational Education and Training Act 1996* do not include similar provisions conferring powers on ANTA in those jurisdictions.



## 2.2.5 Ministerial powers

One further aspect of the legislative provision for the establishment and operation of State Training Authorities is the role of Ministerial powers within that framework. In some of the State and Territory legislation relating to VET

specific functions are expressly provided to be within the Ministerial prerogative. Some of these, for example, in relation to the nomination of the State Training Agency and in relation to the powers to determine the constitution of, and to direct the work of the State Training Authority have already been noted. There are also provisions for Ministerial powers in relation to the powers to establishment and work of other statutory bodies.[30] Further, there is, of course, always in most legislation, the implied, if not express, general broad executive power of the Minister to implement the provisions of the Act, and to make regulations or statutory rules under the Act.[31]

## 3 The regulation of public providers of TAFE

The provision of bureaucratic organisational structures at the federal level and in the States and Territories is a necessary element of a statutory framework for the development of a National Training Policy in the Australian federal system. However, because of the constitutional context in which education remains the responsibility of the States and Territories, this provision is not sufficient to provide the complete statutory framework for the delivery of a National Training System. The complete statutory framework for the delivery of a National Training System includes the regulation of TAFE providers, both public and private, who deliver the vocational education and training. Consequently, the regulation of TAFE providers is an important aspect of the legal regulation of VET.

Currently there are some twelve TAFE institutes in New South Wales, seventeen in Queensland, ten in South Australia and fifteen in Western Australia. At the time of writing there are twenty-four TAFE institutes in Victoria, of which three are part of universities, which are higher education institutions under the (Cth) *Higher Education Funding Act 1988*. In Tasmania, the five previously separate institutes are now under the *TAFE Tasmania Act 1997* all part of a single body, TAFE Tasmania. In the Australian Capital Territory there are the Canberra Institute of Technology, and the Australian International Hotel School. In the Northern Territory there are two TAFE institutes as well as Batchelor College and the TAFE division of the Northern Territory University, and these latter institutions are also higher education institutions under the (Cwth) *Higher Education Funding Act 1988*. Nearly all these public providers of TAFE are multi-campus institutions.[32]



It is inevitable given the historical, geographical and demographic differences between the States and Territories that there will be some diversity in the legislative schemes which have evolved for the regulation of public TAFE providers. Consequently, the regulatory schemes in each of the States' and Territories' legislation relating to public provision of TAFE are not readily categorised. At the currency date of this report, 1 March, 1997, the following

models have been identified. The first model is that which provides a separate statute for each institution. This is unique to the Australian Capital Territory. The second model is the traditional one of control of both the provision of services and of the providers of those services by a government authority, however named, with only a limited degree of devolution of operational authority to the providers. This model is to be found in the legislation in New South Wales, Queensland, South Australia and Western Australia, but it must be noted that the degree of devolution of operational authority varies between these jurisdictions.

The third model is an emergent one which provides for the exercise of executive power through Ministerial control or a statutory authority insofar as the provision of services is concerned, but the providers of services are given a greater degree of operational autonomy, and which again varies from jurisdiction to jurisdiction. However, even in the jurisdictions in which this legislative model is emerging the degree of operational autonomy varies, and it is certainly is not absolute autonomy. The legislative regulation of the providers in the Northern Territory is to be found in the *Education Act 1979* and the legislative regulation of the purchaser, the Northern Territory Employment and Training Authority is under the *Northern Territory Employment and Training Authority Act 1991*. Tasmania has adopted this model in the *TAFE Tasmania Act 1997*, and Victorian TAFE institutes have enjoyed a fair degree of operational autonomy since amendments were made in 1993 to the *Vocational Education and Training Act 1990*. However, in the Northern Territory, Victoria and Western Australia there is a further variation in the regulation of the public providers of TAFE which is that some TAFE institutes are regulated under university Acts.

## 3.1 The Single Institution Legislation: The Australian Capital Territory



The focus of the *Canberra Institute of Technology Act 1987* is to establish the Canberra Institute of Technology[33] and that of the *Hotel School Act 1996* is to establish the Australian International Hotel School[34]—and to provide for their governance and operation. Both institutions are bodies corporate. The functions of the institute include *inter alia* the promotion and fostering of the provision of technical and further education in the Australian Capital Territory,[35] whereas the functions of the hotel school are focussed on the development of the provision of education in hotel management and related fields.[36] The powers of the institutions are detailed, as are the limitations on those powers which cannot be exercised without the formal written approval of the Minister.[37]

The Act also provides for the governance of the institutions: for the appointment, functions and powers of the director of the institute,[38] and similarly for the director of the hotel school.[39] Provision is made in the *Canberra Institute of Technology Act 1987* for the establishment, functions and powers, constitution and terms and conditions of appointment of members of the Council of the institute, as well as for the procedures for meetings and the obligation of disclosure of

direct and indirect pecuniary interests of members.[40] The Council is an advisory council for the director. Under s 30 it is appointed by the Minister, must include some representative members, and the chairperson of the Vocational Education and Training Authority as an *ex officio* member. Similar provision is also made in the *Hotel School Act 1996* for the establishment and functions of the Board of Management of the School.[41] *Inter alia* the Board's powers include the erection of buildings, the charging of fees, conducting a hotel, and providing scholarships and like benefits.[42] The Act also provides for the staff of the institute, and of the hotel school,[43] financial matters,[44] and other miscellaneous powers, which are, however, not identical in each Act.[45]

## 3.2 The traditional model: New South Wales, Queensland, South Australia and Western Australia

The second model is the traditional one of control of both the provision of services and of the providers of those services by a government authority, however named, with only a limited degree of devolution of operational authority to the providers. It is used in New South Wales, in the *Technical and Further Education Commission Act 1990*, in Queensland in the *Vocational Education, Training and Employment Act 1991* and the *Agricultural Colleges Act 1994*, in South Australia, in the *Technical and Further Education Act 1975*, and in Western Australia in the *Vocational Education and Training Act 1996*. As with all the other education legislation, the Acts are similar but not identical. There is also subordinate legislation, that is regulations or statutory rules, which deals with the detail of administration and governance of the technical and further education systems in these jurisdictions.[46] Guidelines may also be issued by the government departments.[47]

The Acts provide variously for control by the Minister and an Education Department or dedicated statutory authority. The New South Wales *Technical and Further Education Commission Act 1990* ss 5–8 provide for the establishment of the TAFE Commission to provide technical and further education services, including in s 7(1)(a), the principal function, the establishment and maintenance of TAFE colleges. Under s 7(2), the exercise of these functions is subject to accreditation by the Vocational Education and Training Accreditation Board. Section 9 provides for Ministerial control and direction of the TAFE Commission, and s 11 deals with the constitution of the TAFE Commission Board, which has a number of *ex officio* members and other members appointed by the Minister. In Queensland under the *Vocational Education Training and Employment Act 1991* the functions of the Vocational Education, Training and Employment Corporation detailed in s 33(1)(a)-(m) include *inter alia* that of providing and promoting vocational education and training programs. Section 33A provides that the corporation is a statutory body and ss 34–38 provide for its powers, including in ss 37 and 38

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powers related to the establishment and maintenance of all State colleges. Under s 31 the director is the corporation sole, who under s 32 is required to act according to the direction of the Minister. The *Agricultural College Act 1994* s 4 provides that the Minister may declare certain State colleges, which offer courses about agriculture, pasturage or animal husbandry to be agricultural colleges. Section 5 provides that certain provisions of the *Vocational Education, Training and Employment Act 1991* do not apply to these colleges. In South Australia ss 6–14 of the *Technical and Further Education Act 1975* provide for the powers of the Minister and the chief executive officer in the administration and control of the Department of Technical and Further Education. The Western Australian *Vocational Education and Training Act 1996* s 35 provides for the Minister's powers in relation to the establishment, amalgamation and closure of colleges, and s 66 provides in further detail for the Ministerial ownership of assets and rights and liabilities on the closure of colleges. However, s 57 of the Act allows the Minister to establish by declaration vocational education and training institutions other than a college.

As far as the appointment of staff is concerned, there are two models for the terms and conditions of the appointment of staff in these jurisdictions where the centralised model is adopted: in Queensland and Western Australia the staff fall within the public sector management legislation,[48] but in New South Wales and South Australia what can be described as the traditional 'teaching service' model is used, that is, the staff are employees of the Crown, but these appointments are made under this dedicated legislation.[49]

In the traditional model, the governance of the individual TAFE institutions varies from jurisdiction to jurisdiction. In Queensland,[50] South Australia[51] and Western Australia[52] provision is made for the appointment of statutory college councils. As is usual in legislation establishing statutory bodies, in the Queensland Act,[53] the South Australian Act,[54] and the Western Australian Act[55] there are similar but not identical provisions covering the operational procedures, the financial powers and the obligations of the college councils. However, there are no provisions in the New South Wales *Technical and Further Commission Act 1990* for statutory councils for the individual TAFE institutes, although the institutes do have advisory councils which provide advice to the directors of the institutes. The regulatory framework of the provision of TAFE in New South Wales can be reasonably characterised as the most centralised, and the regulatory frameworks in Queensland, South Australia and Western Australia, albeit that they may still fairly described as centralised systems, nevertheless provide formally for some degree of devolution of operational decision-making within the individual colleges.

## 3.3 The emergent model: Tasmania, Victoria and the Northern Territory

The third model is an emergent one which provides for the exercise of executive power through Ministerial control or a statutory authority insofar as the provision of services is concerned, but the providers of services, the TAFE institutes, which may be given a greater degree of operational autonomy, and which again varies from jurisdiction to jurisdiction, are controlled by a separate authority. The justification for this model is that it conforms to the requirement of competition policy, that there should be a clear separation between the function of the purchaser of services and that of the provider of services. Consequently in legislation designed to accommodate competition policy there will be two separate sources of authority, one which is responsible for the purchasing of VET and another which is responsible for providing those services. There may also be provisions relating to third party access to the publicly provided TAFE facilities, as well as provisions intended to broaden the regulation of the delivery of courses to allow a range of providers to be registered to provide training and qualifications under less restrictive circumstances. Thus, under the recently amended Victorian *Vocational Education and Training Act 1990* TAFE institutes, which operate under the umbrella of the Office of Training and Further Education, are providers of services and the government, through the State Training Board, is the purchaser of services. In the *TAFE Tasmania Act 1997* TAFE Tasmania and the Board of TAFE Tasmania to regulate the public providers, and again the government is the purchaser of the services. The variation in the structures of these legislative instruments reflects the demographic and geographic differences between these States. However, as there is no readily identifiable matrix which fits the legislation in Tasmania and Victoria, the chief features of each will be described separately. Nevertheless it must be noted that probably as a result of historical factors in the development of the community college, education and university legislation during the 1970s and 1980s in the Northern Territory, this third model is already in place in the Northern Territory, where the regulation of providers is under the *Education Act 1979* and that of the purchaser is under the *Northern Territory Employment and Training Authority Act 1991*.



The *TAFE Tasmania Act 1997* provides for the regulation of the public providers of TAFE in Tasmania. This Act has amalgamated the existing institutes into one, TAFE Tasmania, and consequently there is no express provision in the Act for statutory councils for the regional campuses or institutions. Section 45 provides that the Act is administered by the Minister for Education and Vocational Training, and ss 6–8 establish TAFE Tasmania as an instrumentality of the Crown, and provide for its functions.[56] Section 7 details the functions of TAFE Tasmania. These are:

> *(a) to provide vocational and further education in accordance with any policies and directions provided by the Minister*

*(b) to provide services for students in relation to vocational and further education*

*(c) to develop and maintain communication with employees and students*

*(d) to advise the Minister of any significant development relating to the provision of vocational and further education*

Sections 9–15 provide for the establishment, responsibilities and powers of the Board of TAFE Tasmania, which is responsible for the administration of TAFE in Tasmania, under the direction of the Minister.[57] Sections 13 and 14 provide for the appointment of acting directors, and for the duties of directors. Section 13 includes penalties *inter alia* for failure to exercise 'the same degree of care and diligence that a person in a similar position in a corporation within the meaning of the Corporations Law is required to exercise', a unique provision which explicitly imposes the standards of Corporations Law upon the directors. The Board is required to establish an audit committee, and may also establish advisory committees, and make by-laws in relation to the functions and powers of TAFE Tasmania, the management of TAFE Tasmania and the regulation of the operation of student organisations.[58] Section 36 of the Act provides for the establishment of institutes for vocational and further education, and for the Minister's powers in relation to these institutes. The provision for the employment of staff in accordance with the *Tasmanian State Service Act 1984* also allows for the appointment of staff other than under that Act.[59] Other provisions in the Act provide for the levying of fees, under the oversight of the Tasmanian Government Prices Oversight Commission, which *inter alia* has the functions of ensuring that there is appropriate access to the facilities and equipment owned or managed by TAFE Tasmania, and that conditions of access and the fees levies and charges are appropriate.[60] At the time of writing, no regulations made under this Act are available.

Victoria includes the provisions relating to the regulation of public providers of TAFE in the *Vocational Education and Training Act 1990*. Sections 23 provide for the establishment, amalgamation and closure of TAFE colleges by the Governor-in-Council on the recommendation of the Minister. Section 24 provides for the incorporation of TAFE college councils, by order, and ss 25 and 26 provide for their functions and powers. Section 25 provides that their functions include *inter alia* the management of the college, the provision of efficient and effective technical and further education programs for the needs of industry, students and the general community, and to provide for access for disadvantaged groups. Section 26 provides broad powers for the councils to carry out their functions. Section 27(1) provides for their accountability:

*(1) A council must perform its functions and exercise its powers subject to—*

*(a) a performance agreement and*

*(b) any economic and social objectives established from time to time by the Government of Victoria and*

*(c) any Order in Council made under section 24 and*

*(d) any other requirements of this Act*

The Act provides for the membership of the councils,[61] for the exercise of reserve powers by the Minister in the event that a council is inefficient or incompetency in the management of a TAFE college.[62] However, s 37 provides that certain of these reserve powers do not apply to The School of Mines and Industries Ballarat Limited or to the council of that college. The Act also contains provisions relating to the employment of college directors and college staff by the college councils, which in employing staff does not represent the Crown.[63] This means that the institutional employment position of TAFE institute is similar to that of university staff and is different from the public sector employment of TAFE institute staff in other jurisdictions. The Act also provides in s 94 for the making of regulations by the Governor in Council and subordinate legislation and Ministerial orders and executive memoranda are used to complete the regulatory framework for public providers of TAFE by providing detailed standards for decision-making about a variety of matters within the TAFE colleges, a form of regulatory instrument used in the traditional legislation.[64] The Victorian legislation does not refer explicitly to third party access, but recent amendments to the Act mean that TAFE colleges, universities and the Council of Adult Education will have to be registered with the State Training Board under s 81 to offer 'government accredited' courses, where previously they were exempt from this registration requirement. The scope of registration under s 81 has also been extended to cover 'recognised qualifications' determined by the Board, rather than VET and further education 'courses'.[65]

In the Northern Territory the *Education Act 1979* s 41(1)(a) provides that the Minister:

> *. . . may, by notice in the Gazette, declare an institution established for the provision of educational services in an academic, vocational or practical discipline or of a recreational nature to persons who have attained the age of 15 years, to be a college;*

but, under s 41(2) an institution cannot be declared to be a college if the institution is 'wholly maintained otherwise than by Territory or Commonwealth funding'. The (NT) *Education Act 1979* s 42 provides for the functions of the colleges, and s 43 for their powers. As far as the appointment of staff is concerned in the Northern Territory the staff fall within the public sector management legislation.[66] In the Northern Territory,[67] provision is made for the appointment of statutory college councils. As is usual in legislation establishing statutory bodies, in the Northern Territory Act,[68] are similar but not identical provisions covering the operational procedures, the financial powers and the obligations of the college councils. In the Northern Territory, albeit that it may still fairly described as a centralised system, it nevertheless provides formally for some degree of devolution of operational decision-making within the individual colleges. There is also subordinate legislation relating to the operation of college councils.[69]

Despite the fact that the current Northern Territory, Tasmanian and Victorian Acts are intended to accommodate the implementation of competition policy principles, many provisions of these Acts, particularly those relating to the

exercise of executive power, are similar to those of the more centralised model. It is also arguable that the statutory functions and powers given to the governing body of the Canberra Institute of Technology and the Australian International Hotel School, and the college councils in the Northern Territory, South Australia and Western Australia are not very different from those given the TAFE Board in Tasmania and the TAFE Institute Councils in Victoria. However, in New South Wales, South Australia and Western Australia, the separation of the purchaser and provider functions is not clearly articulated in the traditional legislative schemes.

## 3.4 TAFE divisions in universities

In the Northern Territory, Victoria and Western Australia some university legislation provides for technical and further education in universities. This is a function of the history of the development of TAFE institutions in those jurisdictions. Yet again the legislation is similar but not identical in these jurisdictions. Generally, there is provision for the governance of the TAFE division, and these bodies are accountable to the University Council.

The *Northern Territory University Act 1989* provides in s 24A for the establishment of the Vocational Education and Training Board of the University. The Board is to be constituted and established according to the by-laws of the University. Under s 24A(3)(a) the function of the Board is to provide advice to the University Council or the vice-chancellor particularly with regard to instruction in vocational education and training, including the examinations, assessments and awards, which are deemed to be vocational education and training for the purposes of funding from the Commonwealth or the Territory.

Four Victorian universities—the RMIT University, Swinburne University of Technology, Victoria University of Technology and the University of Ballarat—have statutorily recognised TAFE divisions. The particular university Acts provide for the regulation of these TAFE institutions.[7] The provisions of Part 4, ss 31–35 of the *Swinburne University of Technology Act 1992* are typical. Section 31 establishes the Technical and Further Education Division, and s 32 establishes the Board of Technical and Further Education, the membership of which is to be elected or appointed as is prescribed, and s 33 provides for the election of a chairperson and deputy-chairperson by the Board. Section 34 provides for the powers of the Board, which:

> *(a) may discuss, and advise the Council or the Vice-Chancellor about the development of the Technical and Further Education Division, the provision of effective, efficient and responsible technical and further education programs and services in the geographical area served by the Division, the development of strategic and business plans, capital management plans and performance agreements for the division and any other matters which are relevant to the provision of technical and further education programs and services.*

The Board reports to the University Council, and may regulate its own proceedings subject to the Act and to the Statutes and regulations of the University.[71] There is also provision in s 35 for the establishment of a Board of Technical Studies to undertake the academic oversight of programs and courses of study in technical and further education, and to provide advice to the University Council and the Board of Technical and Further Education about the conduct and content of programs and the awarding of certificates and diplomas in technical and further education. It may be noted in passing that the recent merger of the Victorian College of Agriculture and Horticulture with the University of Melbourne has been accomplished by a different arrangement.[72]

The statutory establishment of the Kalgoorlie Campus of the Curtin University of Technology is, however, rather similar to the provision for the TAFE divisions of RMIT University, Swinburne University of Technology, the Victoria University of Technology and the University of Ballarat. Section 21I of the *Curtin University of Technology Act 1966* provides that the Kalgoorlie Campus, established as part of the university by the University Council, shall include *inter alia* the entity known as the Western Australian School of Mines, facilities for the provision of higher education and facilities for the provision of technical and further education. The functions of the Kalgoorlie Campus under s 21J of the *Curtin University of Technology Act 1966* include the provision of technical and further education relating to the professions, paraprofessional occupations, apprenticeship and pre-apprenticeship courses, and adult education courses. Sections 21K–21M establish and provide for the functions, powers and membership of the Kalgoorlie Campus Council. Section 23 provides for the transfer of the staff of Kalgoorlie College to membership of the university staff.

## 3.5 The regulation of adult, community and further education providers



Two salient features of the provision of adult, community and further education have been noted in this report. The first feature is that it is, strictly speaking, not vocational education and training, but it is generally provided within the public TAFE institutions in all jurisdictions. The second feature is that providers of adult, community and further education, other than the public TAFE institutions, may also provide vocational education and training. Consequently, the regulation of these specialist public providers of adult, community and further education may be considered as part of the regulatory framework for the delivery of a National Training Scheme. It is only in New South Wales, South Australia and Victoria that there is separate regulation of public ACFE providers. In New South Wales the *Board of Adult and Community Education Act 1990* is the relevant Act. In South Australia the Adult Community Education Council is established under ss 16–19 of the *Vocational Education, Training and Employment Act 1994*. In Victoria there are two acts which regulate the provision of public adult, community and

further education: the *Council of Adult Education Act 1981* and the *Adult, Community and Further Education Act 1991*.

The general structure of these Acts is similar but not identical. The New South Wales *Board of Adult and Community Education Act 1990* establishes the Board of Adult and Community Education and provides for its membership of thirteen, which includes two *ex officio* and two nominated members and nine who are appointed by the Minister.[73] Similarly the South Australian *Vocational Education, Training and Employment Act 1994* establishes the Adult Community Education Council, whose members are appointed by the Minister.[74] In Victoria the Council of Adult Education is established as a body corporate under the *Council of Adult Education Act 1981*, which provides for its membership of its Board of fifteen, which includes the director as an *ex officio* member, members elected by the general staff, the teaching staff and the students, a representative of other providers of adult, community and further education, and a nominee of the Adult, Community and Further Education Board, as well as appointees of the Governor-in-Council and co-opted members.[75] However, the Adult, Community and Further Education Board, a body corporate, is established under the *Adult, Community and Further Education Act 1991*, which provides for the membership of the Board, who are appointed by the Minister according to the requirements of the Act.[76] However, unlike the legislation in New South Wales and South Australia, the Victorian *Adult, Community and Further Education Act 1991* provides for the establishment of regions of adult, community and further education and for the establishment of incorporated Regional Councils.[77]

The Acts provide for the functions[78] and powers[79] of these statutory authorities, which must act under Ministerial direction. Generally speaking the functions of these statutory authorities cover the provision of adult, community and further education in broad terms, and require the ACFE authorities to liaise and consult with TAFE authorities. The functions of the New South Wales Board of Adult and Community Education include *inter alia* in s 7(1) of the *Board of Adult and Community Education Act 1990* the promotion of adult and community education in the State, to advise the Minister and the TAFE Commission Board about needs in adult and community education, and to arrange the distribution of government funding in accordance with the guidelines provided by the Minister. Section 7(3) requires that the Board consult with the TAFE Commission. Those of the Adult Community Education Council, set out in s 18(1) of the South Australian *Vocational Education, Employment and Training Act 1994*, are very similar and include the promotion of adult and community education, making recommendations as to funding and advising the Minister on community needs in adult and community education. Section 18(4) requires that the ACEC consult with 'community organisations, local government and other relevant governmental bodies'.



The functions of the Council of Adult Education, under s 5(1) of the Victorian *Council of Adult Education Act 1981* are:

*(a) to provide adult learning programs and services designed to contribute to the knowledge and development of individuals and the community and*

*(b) to manage the business of the Council efficiently and effectively and to prepare periodic management plans and*

*(c) to arrange for the participation in adult, community and further education programs by people who wish to do so and who have not had adequate access to educational programs and*

*(d) as appropriate, to provide support to other adult, community and further education providers and*

*(e) to participate in setting priorities and policies to apply throughout the State and*

*(f) to consult with Regional Councils established under the Adult, Community and Further Education Act 1991 regarding the preparation of regional plans for adult, community and further education in those regions where the Council of Adult Education provides programs or services or is proposing to provide programs or services and*

*(g) to carry out any other function in relation to adult, community and further education that is conferred on the Council by this or any other Act*

The functions of the Adult, Community and Further Education Board, under s 6(1) of the Victorian *Adult, Community and Further Education Act 1991*, are stated to be 'with respect to adult, community and further education that is not provided by the TAFE colleges', and include *inter alia* to inquire into and report upon the general development of policies relating to adult, community and further education, to plan, develop, evaluate and fund policies and programs for adult, community and further education, to provide for its delivery, and to provide advice to the Minister on adult, community and further education. Under s 6(2) it is required to act jointly with the State Training Board in planning for adult, community and further education, and to establish co-operation between the two Boards in relation to accreditation, cross-linking of courses and recognition of prior learning. This Act particularly provides for the issue by the Minister of guidelines, agreements and plans, which must be observed and given effect to by the Board and by any Regional Council, and for co-operation between these bodies and the State Training Board.[50]



Although the Victorian *Council of Adult Education Act 1981* s 14 provides for the appointment of a director and of officers or employees who are not to be members of the public service, the other legislation regulating adult, community and further education in Victoria and in New South Wales provides for the employment of staff as public sector employees.[51] In South Australia the employment of persons in technical and further education is covered by the *Technical and Further Education Act 1975* ss 15–27. All the legislation provides for the making of subordinate legislation.[52]

# 4 Statutory bodies for accreditation and registration of providers and other statutory advisory bodies

A survey of the constitution and the scope of the powers of the State Training Authorities, the State Training Agencies, and the legislative schemes for the regulation of public providers of TAFE does not provide a complete picture of the statutory provision for the regulation and administration of vocational education and training in the States and Territories. In the legislation of all the States and Territories there is provision for other subsidiary statutory bodies the work of which is concerned with the intra-jurisdictional provision of vocational education and training and/or with the implementation of aspects of the National Training Policy.

## 4.1 Statutory bodies dealing with the accreditation of courses and the registration of providers

One of the key features of the current policy relating to the provision of VET is the development of the National Training Framework, which is concerned with the accreditation and recognition of VET programs. Under the Australian Recognition Framework there is to be registration of training providers and the mutual recognition of their products and services across the various States and Territories and individual training providers. Registration is the mechanism for quality assurance and will focus not on the traditional practice of accrediting courses but on recognition for the provision of particular producers and services primarily related to Training Packages.[83] The statutory provision for the accreditation and recognition processes is found in the State and Territory VET legislation.



There are two models. In the Northern Territory, under the *Northern Territory Employment and Training Authority Act 1991* it is the *Northern Territory Employment and Training Authority* which is empowered to accredit courses and to register providers and to suspend or cancel such accreditation or registration,[84] and a separate statutory authority has not been established, although the *Accreditation and Registration Advisory Council* is to review applications for accreditation or registration under the Act and to make recommendations and provide advice to the Authority on these matters.[85] In other jurisdictions either the VET legislation, or in the case of New South Wales, separate dedicated legislation, provides for a separate statutory body to carry out the functions relating to the accreditation of courses and the registration of providers. In these jurisdictions, namely the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Western Australia the focus of both the advisory and

determinative powers of these statutory bodies is the traditional one insofar as the accreditation of courses and the registration of providers is concerned.

In the ACT the *Vocational Education and Training Act 1995* provides for the establishment of the *Accreditation and Registration Council*, the functions of which include *inter alia* advising the Minister on matters relating to the accreditation of vocational education and training courses and the registration of vocational education and training providers, of accrediting courses, including courses in schools and the higher education sector, of registering vocational education and training providers, and of promoting the implementation of national arrangements as well as of monitoring the accreditation and registration system in the ACT.[86] In New South Wales, the *Vocational Education and Training Accreditation Act 1990* deals with the accreditation and registration processes in that state. The Act establishes the *Vocational Education and Accreditation Board* and provides in details for its powers and functions in relation to *inter alia* the accreditation of courses, the registration of providers and liaison with licensing authorities both within New South Wales and elsewhere, as well as for its powers and the procedures which must be followed in the accreditation and registration processes.[87] In Queensland, the *Vocational Education, Training and Employment Act 1991* established the *Accreditation Council* as a standing committee of the Vocational Education, Training and Employment Commission, with advisory and determinative powers similar to those in the other jurisdictions.[88] Similarly the South Australian *Vocational Education, Employment and Training Act 1994* established and provided for the powers and functions of the *Accreditation and Registration Council* relating to the accreditation of courses and the registration of providers.[89] The Tasmanian *Vocational Education and Training Act 1994* provided for the *Tasmanian Accreditation and Recognition Committee*, which has similar functions and powers,[90] and the Western Australian *Vocational Education and Training Act 1996* established the *Training Accreditation Council* to deal with *inter alia* the registration of providers and the accreditation of courses, skills training programs and qualifications gained from such courses and programs.[91] In Victoria, the *Vocational Education and Training Act 1990* has recently been amended by the *Vocational Education and Training (Training Framework) Act 1997*, and *inter alia* continues to provide in ss 73A–74 for the accreditation of courses, and for the State Training Board's powers to investigate whether or not courses should be included in the State Register of Accredited Courses and Recognised Qualifications, which is is obliged to keep under subs 78A(1). However, s 75 enables the Minister to establish *Training Recognition Boards*, which under subs 75(2)(a) are to advise both the State Training Board and the Adult, Community and Further Education Board:

150

> (i) *about the accreditation of vocational education and training and further education courses and*
>
> (ii) *the registration of a person or body as a registered training organisation*

However s 75 does not define the membership of these Boards.

The legislative provisions usually cover the procedures making of applications for accreditation and registration, the criteria for the determination of applications, the procedures for the cancellation, suspension and revocation of accreditation and registration and penalty provisions relating to false advertising in relation to accreditation of courses and registration of providers. This is the case in the relevant legislation in the Australian Capital Territory,[92] the Northern Territory,[93] New South Wales,[94] Queensland,[95] South Australia,[96] Tasmania,[97] Victoria,[98] and Western Australia.[99] However, the provisions although similar in their effect are not identical in each jurisdiction. It may also be noted that both public providers and private providers of VET are subject to these accreditation and registration provisions in the several jurisdictions.

## 4.2 Statutory advisory bodies

In some jurisdictions the legislation also provides for additional statutory bodies, other than those which deal with apprenticeships, or with the administration of the public providers of TAFE, which carry out what are essentially advisory functions in relation to the regulation of VET. Again the nature of these bodies varies from jurisdiction to jurisdiction.

The *Northern Territory Employment and Training Authority Act 1991* provides for the establishment, constitution, procedures and functions of three of these advisory councils. The *Employment and Training Needs Planning Advisory Council* has the functions of providing recommendations and advice to the Authority on employment and training needs generally and in particular the employment and training needs of women. The *Planning and Resources Advisory Council* is to provide advice and make recommendations to the Authority on the distribution of funding. The *Aboriginal Programs Employment Training Advisory Council* is to advise and make recommendations on matters relating to VET for Aboriginal persons.[100]



The Queensland *Vocational Education, Training and Employment Act 1991* provided for a number of *Standing Committees* of the Vocational Education, Training and Employment Commission, including the Accreditation Council noted above, and the *State Development Council*, which was to provide advice to the Minister concerning planning and priorities in meeting the vocational education and training needs of the State, including the development of both public and private sector delivery of vocational education, training and employment services.[101] Further the Minister has power to establish *advisory committees* 'on any aspect of vocational education, training and employment'.[102] Further, the *Vocational Education, Training and Employment Act 1991* s 14 provides for the recognition of *industry training advisory bodies* as 'the principal source of advice to the Commission in relation to matters concerning vocational education and training'. Section 7(3)(f) of the *Agricultural Colleges Act 1994* charges the Boards of Trustees of the agricultural colleges with the task of 'encouraging the

establishment of local industry advisory committees in co-operation with any industry training advisory body for rural industry for the area served by the college'. The South Australian *Vocational Education, Employment and Training Act 1996* s 6(6)(a) also specifically recognizes industry training advisory bodies for consultative purposes.

The Tasmanian *Vocational Education and Training Act 1994* empowered the Minister, on the recommendation of the State Training Authority, by declaration, to establish *advisory committees* to assist the Authority, the Accreditation and Recognition Committee or the Training Agreements Committee.[101] Sections 21–24 of the Act establish *Industry Training Advisory Bodies*. Section 21 provides:

> *(1) The Minister, on the recommendation of the Training Authority, may declare that a body corporate is a training advisory body in respect of an industry or industries if—*
>
> *(a) that body submits its constitution to the Minister and*
>
> *(b) the Minister approves its constitution*
>
> *(2) A declaration—*
>
> *(a) is to be notified in the Gazette and*
>
> *(b) takes effect on or after that notification*

Section 22 provides for the functions and powers of industry training advisory bodies, which are to advise the Training Authority 'on issues relating to vocational education and training in respect to the industry or industries it represents' and to provide information and reports as the Training Authority requires. Sections 23–24 provide for Ministerial control of these industry training advisory bodies.

The Victorian *Vocational Education and Training Act 1990* ss 38–45 also provides for *Industry Training Boards*. Sections 38–40 provide for their establishment by order of the Governor-in-Council, for the content of these orders and for the revocation of such orders. The functions of an industry training board established under s 38(1) are:

*101*

> *(a) within the national and State strategic framework, to prepare quality training plans detailing industry skill requirements, the quantity and types of training needed by industry and training arrangements*
>
> *(b) to promote training within the industry*
>
> *(c) to liaise with or participate on national industry training advisory bodies*
>
> *(d) to participate in accreditation and recognition processes*

The Act also provides for their powers, membership, procedures and immunity from suit.[104]

# 5 The regulation of apprentices and trainees

The regulation of apprenticeship is a core element in the regulation of vocational education and training. Given that the historical development of the apprenticeship system in twentieth century Australia has suggested that consonance between the regulation of training of apprentices and trainees and the regulation of employment conditions of apprentices has been a traditional feature of the system in both the federal and the State and Territory legislation, the salient aspect of the regulation of apprenticeship is that it is regulated by statute through both VET legislation and industrial relations legislation, by awards and in some circumstances by the common law. One commentator has noted:

> *Although training and apprenticeship throughout Australia are today regulated by statute or award, the common law as expounded by either English or Australian courts still applies to those aspects of apprenticeship which are not expressly so covered.*[105]

The key developments in the growth of apprenticeship legislation in Australian jurisdictions during the twentieth century, culminating in the legislative adoption of the concept of the 'declared vocation' or 'declared calling' and in the introduction of this concept to training in fields which did not traditionally have apprenticeships, have already been described.[106] This VET legislation and industrial relations legislation, and awards, regulations and determinations made under these enactments, have generally replaced the application of common law principles relating to apprenticeship, but may still reflect features of the common law contract of apprenticeship.[107] It is the duality of the sources of the law relating to apprenticeship and training which constitutes the interface of VET legislation and industrial relations law, and will continue to do so as far as the implementation of the policy of the New Apprenticeship Scheme is concerned.[108] There are some aspects of this interface of VET legislation and industrial relations law which it is helpful to clarify before proceeding further with the description of the laws. One key aspect is that of the operation of Commonwealth legislation and the second is the relationship between Commonwealth awards and State and Territory legislation dealing with the regulation of apprenticeships and training.



## 5.1 Commonwealth legislation relating to apprenticeship

As is the case with education, the power for the regulation of apprenticeship remained with the States in the Australian *Constitution Act 1900*, and this situation has not altered. However, other heads of power, particularly in s 51 of the Constitution, could enable the Commonwealth to become involved with the

regulation of apprenticeship. These powers in the Constitution have been the defence power in s 51(pl vi), the bankruptcy power in s 51(xvii),[109] the corporations power in s 51(xx),[110] the social services power in s 51(xxiiiA),[111] the external affairs power in s 51 (pl xxiv),[112] the conciliation and arbitration power in s 51(xxxv), and s 61, the executive power of the Federal Government, which for example, enables it to establish the Commonwealth public service.[113] However, it must be remembered that the powers in s 51 are not given exclusively to the Commonwealth, but remain concurrently capable of exercise by the States.

For the purposes of this research, it is the legislation which has resulted from exercise of the defence power and from the exercise of the conciliation and arbitration power which is immediately relevant to this review of the regulation of apprenticeship. The *Tradesmen's Rights Regulation Act 1946* was introduced under the operation of the Commonwealth defence power in s 51(pl vi) of the Constitution as this was set out in the *National Security Act 1939*. The regulations made under the latter Act enabled the government:

> *(a) to make provision for dealing with the abnormal industrial conditions directly resulting from the operation of those regulations and*
>
> *(b) to make provision for the training and employment of members of the Forces, as defined in this Act, in the trades to which this Act applies, as a measure of the rehabilitation of those members*

In essence what this Act did for the engineering trades, the boilermaking trades, the blacksmithing trades, the electrical trades, the sheet metal trades and the boot trades was to provide for the recognition of trade skills gained in a variety of ways. Section 10 defined what was a 'recognized tradesman' for the purposes of the Act. For each group of trades covered by the Act, it established a system of a central committee and a local committee, of both employer and employee representatives, and these committees were empowered to grant certificates to the recognized tradesman. As the decades passed there were amendments to the Act as changing circumstances, for example in immigration, brought new problems of the recognition of trade experience which was outside that of the traditional indentured apprenticeship. As the Act is still in force,[114] its recognition of alternative trade training is part of the law relating to VET, and it continues to co-exist with current State and Territory law relating to apprenticeship and training. Whether its validity can be contemporaneously justified as an exercise of the Commonwealth defence power may be a moot point, but it can be suggested that confirmation of its validity might be found under the exercise of the Commonwealth immigration power in s 51(pl xxvii). Although it is not part of a current regulatory response to the implementation of the National Training System in general, and the New Apprenticeship Scheme in particular, it nevertheless is not disconsonant with the latter because it remains the legislative basis of one means of recognition of alternative trade training outside the traditional apprenticeship system, which is of significance in facilitating the recognition of migrants' skills.

Commonwealth industrial relations legislation involves chiefly, but not only, the exercise of the conciliation and arbitration power in s 51 (pl xxxv) in the Constitution. The first point which may be made is that it is well established that training is an industrial matter and that an interstate dispute over the pay and conditions of apprentices and other trainees, as employees, can constitute an industrial dispute invoking the jurisdiction of the Federal Industrial Tribunal.[115] Certain provisions of the Commonwealth *Workplace Relations Act 1996* are clearly relevant to the implementation of the New Apprenticeship Scheme. In general terms this Act provides the regulatory framework for the federal industrial relations system and for the Australian Capital Territory, the Northern Territory and in Victoria since 1997. The provisions which relate to apprenticeships and traineeships in the *Workplace Relations Act 1996* are intended to maintain the wage arrangements in awards and agreements for existing apprenticeships and traineeships and to allow for the development of industrial relations arrangements in both awards and agreements to accommodate the more flexible New Apprenticeship Scheme.[116]

That employment conditions of apprentices and trainees are to be taken into account in awards and agreements determined under the federal industrial relations system is evident from a number of provisions in the Act, briefly noted below, which confirm that the regulation of VET continues to be part of industrial relations law, and that consequently there needs to be consonance between this legislation and the regulation of the New Apprenticeship System.

- Under ss 88B(3)(b) and 143(1C)(e) the Australian Industrial Relations Commission (AIRC) is to take into account the need to support training in determining appropriate trainee wage arrangements.
- The Employment Advocate's functions under s 83BB(1)(a)–(c) include *inter alia* the provision of advice to employees and employers about their rights and obligations generally under the Act, and, in connection with Australian Workplace Agreements (AWAs), about relevant award and statutory entitlements and the relevant provisions of the Act. Under s 83BB(2) the Employment Advocate is to 'have regard to: (a) the needs of workers in disadvantaged bargaining positions (for example: women, people from a non-English-speaking background, young people, apprentices, trainees and outworkers)'.
- Section 89A relates to the scope of industrial disputes, and under s 89A(2)(c) these can include rates of pay for 'junior, trainees or apprentices'.
- Section 96 provides that when the AIRC is determining an industrial dispute 'in which the rates of pay or conditions of employment applying to apprentices are in question, the Commission shall take into account any scheme of apprenticeship provided by or under the law of a State or Territory'.
- Section 170LZ(2)(c) which deals with Certified Agreements, and s 170VR(2)(c) which deals with AWAs, provide that the provisions relating to apprenticeship 'operate subject to the provisions of a State law, award or agreement which deals with the matter'.

- Section 170XC, which covers trainees, and s 170XD, which covers apprentices, are relevant to the implementation of training agreements in the New Apprenticeship Scheme, and provide that apprentices and trainees constitute special cases for the application of the 'no-disadvantage' test and that the adjustment, in relation to a federal award or agreement, of apprentices' and trainees' wages in a training agreement for approved apprenticeships and approved traineeships, does not constitute a disadvantage.

In broad outline the effect of these provisions of the (Cwth) *Workplace Relations Act 1996* upon apprenticeships and traineeships is as follows. Firstly, whilst there will continue to be a split between on-the-job and off-the-job training times, the NAS envisages far greater variation and flexibility in the proportions of these time allocations than the traditional apprenticeship structure. For such training agreements to comply with the provisions of the *Workplace Relations Act 1996* (where such employment is covered by a federal award) they must meet the requirements, amongst other things, of the 'no disadvantage' test. Special provisions of the *Workplace Relations Act 1996* (s 170XC for approved traineeships agreements and s 170XD for approved apprenticeship agreements) will permit the adjustment of award wage rates under the respective agreements so as to accommodate the changed ratios in the NAS contracts. A second aspect of this revised approach is that the federal Industrial Relations Commission is now required, pursuant to s 143(1C)(e), to make provision for 'support to training arrangements through *appropriate* trainee wages and a supported wage system for people with disabilities'. This seems likely to give rise to a complete reconsideration of trainee wages in awards.

The Commonwealth *Workplace Relations Act 1996* is also the industrial relations legislation relevant to the operation of the New Apprenticeship System in Victoria and there are a number of provisions in the recently amended Victorian *Vocational Education and Training Act 1990* which provide for the relationship between that Act and industrial relations legislation. Section 9C provides that the State Training Board, if declared an approving authority under the *Workplace Relations Act 1996* (Cwth) may exercise those functions, and under s 20AA there is a power of delegation of those functions to certain persons.



It may be noted that the authorities which can approve apprenticeships and traineeships for the purposes of the Commonwealth *Workplace Relations Act 1996* include an existing statutory State and Territory authority which deals with traineeships or apprenticeships, or an ITAB, which is declared to be an approving authority by either the federal Minister for Employment, Education, Training and Youth Affairs, or the federal Minister for Schools, Vocational Education and Training. At the time of writing the Queensland Vocational Education, Training and Employment Commission, the Victorian State Training Board and the Western Australian Training Accreditation Council have been declared approving authorities. *Inter alia* the approving authority will be able to determine the combination of training and work used to calculate the wage rate, and may also

invoke new criteria, for example the achievement of competences, rather than age or time served, on which movement up the wage scale can be based.[117]

A second aspect of the Commonwealth's exercise of its conciliation and arbitration power is also relevant to the regulation of VET within the industrial relations system. Following the issue of *Working Nation: The White Paper on employment and growth* in 1993, the AIRC in the *National Training Wage Interim Award 1994*[118] approved of the concept of a 'training wage' for adults in training and for young people employed under federal awards. It was intended that this would extend also to persons employed under State awards.

> *Agreed adult rates are set at the levels of trade-related skills, semi-skilled, and base-skilled. Rates for young workers vary according to the year of completion of school and the time elapsed since that date, the time spent in training, and the skill level required in the trainee position.*[119]

The development of the National Training Wage was accompanied by the introduction of NETTFORCE, to attempt *inter alia* to increase entry-level training places.[120] It may also be noted that currently the Federal Government has established a scheme, administered by DEETYA, to supplement the wages of full-time apprentices and trainees employed under the new industrial relations arrangements so that they will receive at least the National Training Wage minimum payments from ages 16–18 years, and a minimum wage when they have qualified at the Australian Qualification Framework Level 2 and are training further to gain Level 3 skills.[121]

## 5.2 Federal-State relations in the law dealing with the regulation of apprentices and trainees

The fact that both federal industrial relations legislation and awards and State and Territory legislation deal with the regulation of apprentices and trainees has inevitably raised the issue of the relationship between the federal law and the State law. For example, s 96 of the Commonwealth *Workplace Relations Act 1996* raises the issue of the extent to which a federal award incorporates the State apprenticeship laws. Awards may do this in various ways, or not at all. There may be an expressed intention that the State legislative provisions should be operative insofar as they are not inconsistent with the award, as was the case in the Metal Industry Award, cl 14(p).[122] Alternatively, there may be an actual incorporation of State legislative provisions into the award. Finally, the award may be silent on matter.[123] There have been a number of decisions which have dealt with the issue of apprenticeship legislation. Some of these may be briefly noted to highlight the importance of this issue. In *R v President of the Industrial Training Commission of Victoria: Ex parte Ford Motor Co of Australia*, (1980) the powers of the then Victorian Industrial Training Commission in relation to investigating the summary dismissal of an apprentice were upheld even though the apprentice was working under a federal award.[124] The decision was also

made in *McManus v General Electric Co of Australia Ltd* (1971)[125] by the Commonwealth Industrial Court, and in *Seymour v Stawell Timber Industries* (1985)[126] by the Federal Court that if an award provided for the operation of State apprenticeship laws, then those laws were enforceable under the federal industrial relations legislation.[127] One commentator has summarized the situation in these words:

> *Where a federal award or agreement makes provision for a particular aspect of apprenticeship, it takes precedence over the State legislation on that matter only. Where a federal award is silent on any apprenticeship matter, the State legislation prevails with respect to that matter.*[128]

## 5.3 Towards the New Apprenticeships: The State and Territory legislation

### 5.3.1 The New Apprenticeship System

The New Apprenticeship System, which was introduced from 1 January, 1998, is a major feature of current VET policy.[129] Briefly, New Apprenticeships require a registered training agreement, which sets out a negotiated training program leading to a nationally recognised qualification, and provides for paid work and structured training. The common regulatory framework for apprenticeships and traineeships will include the Training Packages endorsed by the National Training Framework Committee of ANTA, the registration of training providers by the State and Territory recognition authorities, and a training agreement which is to be made between the employer and the apprentice or trainee. The States and Territories, with the exception of New South Wales, have agreed that the system of 'declared vocations' for apprenticeships and traineeships, will no longer apply.

The development of the legislative regulation of apprenticeship in the Australian State and Territory jurisdictions during the twentieth century has been outlined in the historical overview.[130] It may be recalled that this legislative development culminated in the 1970s and 1980s with the adoption of the concept of the 'declared vocation' and the 'declared calling' as the basis for the formal regulation of entry level training by way of both traditional apprenticeships and traineeships in fields which had not traditionally used apprenticeship training. The evolutionary development of this legislation has continued in recent years in some jurisdictions. It may be noted that although concept of the 'declared calling' or 'declared vocation' remains important in the current legislation in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania, it has become less significant in recent years in the other jurisdictions. In Queensland in the *Vocational Education, Training and Employment Act 1991*, as amended by the *Vocational Education, Training and Employment Amendment Act 1993*, and in Western Australia in the *Vocational Education and*

*Training Act 1996*, an arguably broader concept of 'training schemes', which are not confined to 'declared callings', is currently applicable. In Victoria the *Vocational Education and Training (Training Framework) Act 1997*, has been passed to facilitate the introduction of the New Apprenticeship Scheme. In all the other jurisdictions the legislation as at 1 March, 1998 has not been amended, and reflects the traditional system of declared vocations.[131]

## 5.3.2 The legislative regulation of apprenticeship

Essentially the traditional legislative schemes limited apprenticeships and traineeships to those skilled occupations which were declared according to the terms of the relevant Acts. Responsibility for the regulation of apprenticeships and of traineeships was generally given either to the State Training Authorities or to a dedicated statutory apprenticeship authority, which might, however, share some responsibilities with a senior administrator in the department responsible for the administration of the Act. One further point needs to be made about this legislation. It was a feature of the apprenticeship legislation that there was consonance with the industrial relations legislation. This, as we have noted above, could include federal industrial legislation and awards. However, because the powers given to the Federal Government in s 51 of the Constitution remained concurrently capable of exercise by the States, there are, and have been during the twentieth century, State industrial relations jurisdictions. Currently, these remain active in New South Wales, Queensland, South Australia, Tasmania and Western Australia. Hence there remains a need for the apprenticeship legislation to remain consonant not only with federal industrial relations and awards, but also with State industrial relations legislation and awards in these five States. The interaction between apprenticeship legislation and the industrial law of the States and Territories is dealt with further in section 5.4 of this chapter.

The Australian Capital Territory *Vocational Education and Training Act 1994* provides that the Training Authority is to be the approving body, with supervisory and regulatory powers in relation to the determination of approved training and prescribed vocations.[132] Under the *Northern Territory Employment and Training Authority Act 1991* the Training Authority has similar responsibilities in relation to the approval of agreements,[133] but it is the chief executive officer of the department who is empowered to approve training facilities, and contracts of training.[134] In New South Wales, the *Industrial and Commercial Training Act 1989* provides for the appointment, functions and powers of a Commissioner of Vocational Training.[135] This Act also established the Vocational Training Board, and provided for its functions and procedures.[136] The South Australian *Vocational Education, Employment and Training Act 1994* provides that the responsibility for the regulation of apprenticeships and traineeships rests with the Accreditation and Recognition Council,[137] which may establish the Disputes Resolution Committee to determine disputes.[138] In Tasmania under the *Vocational Education and Training Act 1994* the Tasmanian Training Agreements Committee has functions *inter alia* in relation to the administration of vocational placements and

training agreements.[138] However, the power to declare vocations rests with the Minister on the recommendation of the Training Authority.[140]

In the traditional schemes there are similar, but not identical, provisions relating to the declaration of vocations and callings to which the provisions relating to apprenticeships and traineeships apply. For example, the New South Wales *Industrial and Commercial Training Act 1989* subs 21(1) provides for the power of the Minister to issue an order to 'designate any vocation to be a declared trade or a declared calling for the purposes of this Act' and subs 21(2) provides that 'the same vocation may be both a declared trade and a declared calling'.[141] Section 22 empowers the Director-General to make orders relating to the term of apprenticeships and traineeships, the courses of study, the on-the-job training to be provided and other matters relating to the training of apprentices and trainees. Section 23 empowers the Director-General to issue vocational training guidelines.[142] There are similar, but not identical, provisions in the Australian Capital Territory *Vocational Education and Training Act 1994*,[143] the *Northern Territory Employment and Training Authority Act 1991*,[144] the South Australian *Vocational Education, Employment and Training Act 1994*,[145] and the Tasmanian *Vocational Education and Training Act 1994*.[146]

Fairly detailed statutory regulation of training agreements or contracts has been a traditional hallmark of apprenticeship law. Similar, but not identical, provisions exist in the current legislation in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania. Unlike the New South Wales *Industrial and Commercial Training Act 1989*, which provides separate but essentially parallel provisions for apprenticeships and traineeships,[147] the Australian Capital Territory *Vocational Education and Training Act 1994*, the *Northern Territory Employment and Training Authority Act 1991*, the South Australian *Vocational Education, Employment and Training Act 1994* and the Tasmanian *Vocational Education and Training Act 1994* do not distinguish between the regulation of apprenticeships and of traineeships in declared or prescribed vocations.[148] Despite the different legislative structures, these Acts are generally similar in their regulation of the contractual relationship between employers and apprentices and trainees. In the Australian Capital Territory, New South Wales, South Australia and Tasmania there is a prohibition upon the employment of apprentices and trainees except under an approved agreement,[149] while in the Northern Territory, employers are required to register as employers of trainees within 14 days of employing the person.[150]



What is to be included in the training contract is specified in all the legislation. For example, s 31 of the New South Wales *Industrial and Commercial Training Act 1989* provides, in respect to apprenticeships, that:

> *Except as otherwise provided by a vocational training direction, the conditions of apprenticeship, including—*
>
> *(a) the term of the apprenticeship and*
>
> *(b) the course of studies to be undertaken by the apprentice and*

(c) *the course of on-the-job training to be undertaken by the apprentice, shall be as specified by the relevant vocational training order.*

Section 49 of the Act provides similarly in relation to traineeships. The legislation in the Australian Capital Territory,[151] the Northern Territory,[152] South Australia[153] and Tasmania[154] contains similar provisions about the content of the training contracts. Provisions relating to the variation, cancellation, and assignment of contracts of training are also found in all legislation.[155] Further, all legislation provides that contracts of training are binding, and imposes obligations on both employers and apprentices or trainees.[156] Again, it must be remembered that although the general legal effects of these provisions relating to contracts of training are similar in all these jurisdictions, the wording of the provisions is not identical. This is illustrated also in the provisions in all this legislation which provides for the recognition of the completion of the contract of training when the trainee is qualified.[157]

The traditional legislative regulation of contracts of training goes beyond the formation of the contract and the obligations arising under it. It also extends to supervision of such contracts. The legislation in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania contains provisions for the appointment of inspectors to see that training is being carried out according to the contract, and provides for sanctions to enable the adequate enforcement of the terms of the contract.[158] Further, the legislation in the Australian Capital Territory,[159] the Northern Territory,[160] New South Wales,[161] South Australia[162] and Tasmania[163] includes grievance procedures, which are the procedures to be used for the resolution of disputes which might arise in the execution of the contract of training. These provisions vary in their complexity from jurisdiction to jurisdiction, but generally cover the grounds upon which a party to a contract of training, or other authorised person, may make a complaint, the procedures to be followed in the laying of the complaint, the procedures which are to govern the hearing of the complaint by the relevant statutory body, the powers of that body in making its determination, and appeal provisions.



Some examples illuminate the nature of these provisions. As to the grounds of complaint for example, in New South Wales, the complaint is made to Commissioner of Vocational Training, who is required to refer it to the Vocational Training Board,[164] and the grounds upon which a complaint may be made include a failure to discharge obligations under apprenticeships and traineeships, and failure to consent to an assignment, suspension or cancellation of an apprenticeship or traineeship.[165] There are varied approaches to the procedural requirements for the resolution of grievances. The statutory provisions vary in their complexity from jurisdiction to jurisdiction, but generally cover the grounds upon which a party to a contract of training, or other authorised person, may make a complaint, the procedures to be followed in the laying of the complaint, the procedures which are to govern the hearing of the complaint by the relevant

statutory body, the powers of that body in making its determination, and appeal provisions. For example, the *Northern Territory Employment and Training Authority Act 1991* ss 70–72 detail how the Review Board is to conduct an inquiry. Section 70 provides that written notice of not less than seven days must be given to the parties. Section 71(1) provides that an inquiry is to be 'by way of a rehearing', which means that all issues of fact and law will be examined. Section 71 further provides:

> *(2) The Board, in carrying out its functions under this Division, is not bound—*
>
> *(a) by the rules of evidence and may inform itself on any matter and in such manner as it thinks fit or*
>
> *(b) to act in a formal manner and may act without regard to legal forms and technicalities*
>
> *(3) Subject to this Division, the procedures at an inquiry under this Division shall be as determined from time to time by the Board.*
>
> *(4) An inquiry of the Board under this Division shall be held in private unless the parties to the inquiry determine otherwise.*
>
> *(5) The Board may determine who may be present at an inquiry held under this Division.*
>
> *(6) The Board may examine documents produced at an inquiry under this Division and may copy those documents or retain those documents for as long as is necessary for the purposes of the inquiry.*
>
> *(7) The Board shall ensure that each party to an inquiry under this Division has a reasonable opportunity to present his or her case, to inspect all relevant documents and to make submissions to the Board.*
>
> *(8) A party to an inquiry under this Division may appear in person or be represented by another person.*
>
> *(9) A person who represents a party at an inquiry under this Division has the same protection and immunity as a legal practitioner has in appearing for a party in proceedings before the Supreme Court.*
>
> *(10) A witness at an inquiry under this Division has the same protection and immunity as a witness has in proceedings before the Supreme Court.*
>
> *(11) The Board may, for the purpose of carrying out an inquiry under this Division—*
>
> *(a) take evidence on oath or affirmation*
>
> *(b) proceed in the absence of a party and*
>
> *(c) adjourn the inquiry from time to time*



Section 72 enables the president of the Board to summon persons to attend and to produce documents. A number of effects flow from provisions such as these. Evidence, such as hearsay evidence, which would otherwise be excluded in a court, may be admitted. Formalities and legal technicalities are not to govern the proceedings, but the Board is nevertheless given considerable power to ensure the attendance of witnesses and to obtain documentary evidence. The rules of natural justice such as the giving of notice and the right to be heard are

embodied in these provisions. There is a right to legal representation and appropriate immunity for the representative and for any witness.

A further example relates to the powers of the various statutory bodies to make determinations. The South Australian *Vocational Education, Employment and Training Act 1994* provides in subsection 40(3) that:

> *The Disputes Resolution Committee must inquire into a matter referred to it under this section, and may, if it thinks fit, by order, exercise one or more of the following powers:*
>
> *(a) it may reprimand a party in default*
>
> *(b) it may suspend a person from his or her employment under a contract of training for a period not exceeding four weeks commencing on a date specified in the or*
>
> *(c) it may confirm or revoke a suspension imposed under subsection (7) and, in the event of revocation, order the employer to pay any wages that would but for the suspension, have been payable under the contract*
>
> *(d) it may extend the term of a contract of training*
>
> *(e) it may cancel a contract of training as at the date specified in the order*
>
> *(f) it may order a party to the contract to pay such wages or take such other action that, in the opinion of the Committee, he or she is required under the contract or under this Part*
>
> *(g) it may excuse a party to the contract from performing one or more of his or her obligations under the contract*
>
> *(h) it may order that, for the purpose of computing the period of training that has been served by a trainee, a specified period or periods be excluded*
>
> *(i) it may withdraw the approval granted by the ARC under this Part in relation to the employment by an employer of trainees*
>
> *(j) it may order an employer not to employ any trainees in addition to those named in the order without the approval of the Committee*
>
> *(k) it may make any consequential orders that the Committee thinks necessary or expedient*

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Subsection 40(7) deals with the employer's power to suspend a trainee where the employer has grounds to believe that the trainee is guilty of wilful and serious misconduct, and the employer's obligation to refer the matter to the Disputes Resolution Committee within three days of the suspension. The legal effect of a statutory provision such as this is that the Disputes Resolution Committee is given quite extensive powers to deal with breaches of the contract of training, including a power of specific enforcement of the terms of the contract, a remedy traditionally not used where there is a breach of a common law contract of employment. Again, it must be stressed that the statutory provisions are not identical in each of the jurisdictions, but it can be reasonably said that the statutory bodies established to deal with disputes arising from contracts of training in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania are given considerable powers in relation to

the resolution of grievances, powers which affect the operation of the employment relationship.

In Queensland by 1993 and in Western Australia by 1996, the apprenticeship legislation had evolved to the point where the concept of 'training schemes', which could include 'declared' or 'prescribed' vocations but was not limited to these, had been introduced. At one level, this concept of 'training schemes' can be considered a distinction without a difference, but on the other hand it can be argued that the concept of approved training schemes, which include the 'declared' apprenticeship or calling, but are not limited to such 'declared' occupations, is arguably a broader concept which anticipates the removal of the requirement that there be declared vocations and callings which characterises the New Apprenticeship System. In the Queensland Act, which was amended by the *Vocational Education, Training and Employment Amendment Act 1993*, provision is made in s 68(1) that:

> *(1) The State Training Council may approve a type of training scheme (an 'approved training scheme') it considers necessary or desirable to advance the knowledge and skills required in industry or commerce.*
>
> *(2) An approved training scheme may consist of -*
>
> *(a) a traineeship or*
>
> *(b) an apprenticeship—*
>
> *(i) in an apprenticeship calling or*
>
> *(ii) to a group of occupations, at least 1 of which is an apprenticeship calling or*
>
> *(iii) in part of an apprenticeship calling*

Subsection (7) further provides that an employer may apply to the Council to employ a person under a training agreement in a training scheme not approved by the Council, and subs (8) enables the Council to approve this training scheme so that it is covered by the Act. The Western Australian *Vocational Education and Training Act 1996* provides in s 58 that the Minister may establish training schemes. Under subs 58(2) a training scheme:



> *(a) is to provide for such accredited courses and skills training programs, whether on-the-job or off-the-job or both, as the Minister may determine, in the case of a scheme established, or approve, in the case of a scheme recognized, under this section and*
>
> *(b) may take the form of, or include, an apprenticeship*

Subsection 4 provides that for the purposes of this section

> *'apprenticeship' means a training scheme involving a contract between an employer and an employee under which the employer undertakes to train the employee in a particular trade.*

This section does not invoke the concept of a 'declared vocation', but in s 59, which provides that regulations may be made for the 'establishment, implementation or recognition of a training scheme', subs 59(1)(a) provides that

prescribed vocations may be included in the regulations for the operation of a training scheme. Read together these provisions make the application of the Part of the Act which deals with Training Schemes broader than the traditional legislation, and training schemes are not limited to declared trades and declared vocations. It may be noted that, at the time of writing, proclamation of this part of the Act is still pending, and the regulations made under the (WA) *Industrial Training Act 1975* are still in force.

These provisions may be compared with the recently amended Victorian *Vocational Education and Training Act 1990*. The changes to s 3 included the omission of the definition of a 'declared vocation', and the substitution of the term 'training agreement' for the term 'contract of training in a trade' in the definition of 'apprentice'. Section 58(1) simply states that ' the Board may determine that a specified training scheme is an approved training scheme'. The effect of these amendments is that the training schemes regulated by the Act are not limited to those related to a 'declared vocation'.[166]

However, an examination of the regulation of apprenticeship in Queensland, Western Australia and Victoria suggests that, despite the development of the concept of training scheme, in many respects this legislation is similar to the legislation in the other Australian jurisdictions. In both Queensland and Victoria there is provision for a statutory authority to deal with the training scheme. In Queensland, under the *Vocational Education, Training and Employment Act 1991* the functions of the Vocational Education, Training and Employment Commission include the determination of policy in relation to regulated training, including apprenticeship, traineeship and other training systems.[167] However, it is the State Training Council which is responsible for the administration of approved training schemes, which may include both traineeships and apprenticeships.[168] In Victoria under the *Vocational Education and Training Act 1990* the State Training Board is the responsible body which is empowered to determine what are approved training schemes.[169] However, in Western Australia, s 58 of the *Vocational Education and Training Act 1996* provides that the Minister may establish training schemes.

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In the Queensland and Victorian legislation there is fairly detailed regulation of the training agreements as to their approval and content and the obligations of the parties,[170] but in the Queensland Act there are some provisions which relate only to apprentices.[171] Section 56 of the Victorian Act which details requirements as to the form and content of training agreements, including who are to be the parties to a training agreement, clearly provides for arrangements to be consistent with the New Apprenticeship System. Under s 56(6) the employer is required to arrange for a number of matters in the execution of the training agreement and its lodgement with the State Training Board, and for:

> *(c) the apprentice to be enrolled in a vocational education and training course provided by a registered training organisation, as required by the approved*

*training scheme, within 3 months after the date of commencement of the training agreement and*

*(d) an outline of the training to be signed by—*

*(i) the employer*

*(ii) the apprentice and*

*(iii) the registered training organisation*

and a copy of this outline is to be lodged with the Board or an approved training agent within three months of the commencement of the training agreement. There are also provisions relating to the variation, cancellation or suspension of training agreements and for their assignment to another employer in some circumstances.[172] In both jurisdictions there are provisions relating the appointment of authorised persons or inspectors to ensure that the requirements of the training agreements are being met.[173] The legislation in both Queensland and Victoria contemplates the use of group training schemes. The definition section of the Queensland Act, s 4, provides that:

> *'group training scheme' means an industrial organisation or a body corporate that is approved by the State Training Council to employ apprentices or trainees but which uses the facilities of its members or other employers to train those apprentices or trainees.*

Section 79 of this Act, which deals with an employer's entitlement to employ an apprentice, makes further provision for the operation of group training schemes. Section 61 of the Victorian Act provides that associations of employers may employ apprentices, and if that association is not a body corporate, one member must be appointed to execute the training agreement and be responsible for complying with the Act and the regulations.

Further, in both Acts provision is made for grievance procedures, although the scope of these provisions is not the same in both jurisdictions.[174] In making provision for these matters the legislation in Queensland and Victoria is similar, but not identical to that in the jurisdictions in which the concept of a 'declared vocation' is still extant. Some examples of these provisions have been given above and the scope of the Victorian provision is similar. Section 60(1) of the Victorian *Vocational Education and Training Act 1990* provides:

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> *(1) The Board may determine any question or difference arising between an employer and an apprentice about—*
>
> *(a) the training agreement or anything contained in the training agreement or*
>
> *(b) the construction or operation of the training agreement or*
>
> *(c) the rights, duties and liabilities of the employer or apprentice under the training agreement or*
>
> *(d) the dismissal or threatened dismissal of an apprentice if the apprentice believes that the dismissal or threatened dismissal is harsh, unjust or unreasonable*

Section 60(2), however, excludes any questions relating to whether money is or is not due to be paid by the employer to the apprentice. The Board's powers under s 60(3) are to enquire into any matter referred to it under this section and it may:

> *(a) cancel, suspend or vary the training agreement or*
>
> *(b) order all or any parties to a training agreement to perform all or specified obligations or duties under or related to the agreement or*
>
> *(c) make any consequential orders it thinks fit*
>
> *(d) make any other order it thinks fit*

Unlike legislation in other jurisdictions s 60(4) excludes the right of legal representation to parties to a proceeding before the Board. Section 60(5) provides for a statutory penalty for contravention of any order made by the Board. There are no specific statutory provisions relating to appeal from a decision of the Board under this section, but if the decision from which an appeal was sought fell within the criteria of reviewable decisions in the Victorian *Administrative Law Act 1978* then appeal under that judicial review legislation would be possible.

However, there are some provisions relating to other matters which are to be found in one Act but not in the other. The Queensland *Vocational Education, Training and Employment Act 1991* s 73(8) provides that the State Training Council must issue a certificate of completion if satisfied that approved training scheme has been completed. The Victorian *Vocational Education and Training Act 1990* does not have a parallel provision. However, s 63 provides that the State Training Board must establish and maintain a register of apprentices and s 64 that the Board may subsidise an apprentice who is required to attend a training scheme, conducted by a registered training organisation, at a place 'remote from the apprentice's home or place of work'.

The legislative scheme of the Western Australian *Vocational Education and Training Act 1996* provides a further variation on the theme of interjurisdictional difference, in that much of the regulatory detail will be provided in subordinate legislation. It has already been noted that under s 58 of that Act it is the Minister who is responsible for the administration of the Act who has the power to establish, implement or recognise training schemes for the purposes of the Act. Under s 59 regulations relating to training schemes may:

> *(a) prescribe the vocations in relation to which a training scheme may operate*
>
> *(b) prescribe requirements to be met by trainees and employers of trainees including requirements that—*
>
> > *(i) trainees undertake prescribed courses or skills training programs and*
> >
> > *(ii) employers grant leave of absence from employment without deduction from wages to enable trainees to fulfil prescribed requirements*
>
> *(c) prescribe the amount of paid employment to be provided to a trainee*
>
> *(d) provide for the transfer of employment of trainees and*

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*(e) provide for the resolution of disputes arising between an employer and a trainee in relation to any agreement concerning training between that employer and trainee, and in particular, in relation to—*

*(i) the construction or operation of*

*(ii) the rights, duties and liability of the employer or trainee under or*

*(iii) the termination or threatened termination of, any such agreement*

The (WA) *Industrial Training (General Apprenticeship) Regulations 1981* define what are apprenticeship trades, and provide *inter alia* for the eligibility for apprenticeship, probationary employment, the transfer and cancellation of the apprenticeship agreements, misconduct, the technical training to be undertaken, the responsibilities of the employer and apprentice, the issue of the final certificate, and procedures for the resolution of disputes.[175]

## 5.4 Apprenticeship legislation and State industrial law

The formation, execution and supervision of contracts of training may also be affected by other law relating to the regulation of the workplace. It is not surprising, therefore, that the law relating to apprentices and trainees, usually expressly refers to relevant industrial law. Where that relevant industrial law is federal law, as in the Australian Capital Territory and the Northern Territory, it is not surprising to find that consistency is sought between the Territory apprenticeship and training law and the federal law. The Australian Capital Territory *Vocational Education and Training Act 1995* s 34(1)(b) provides that the standard terms of a training agreement must ensure that the conditions of the trainee's employment are consistent with the relevant industrial award the Commonwealth industrial relations legislation. Similarly, the *Northern Territory Employment and Training Authority Act 1991* s 28(3) provides that the secretary may determine the terms and conditions of employment in a training contract only where those terms and conditions are not fixed by an award or the Commonwealth industrial relations legislation.

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Where there is State industrial law in operation, it typically provides for its application to apprentices and/or trainees. The New South Wales *Industrial Relations Act 1996* s 6, which provides the definition of industrial matters covered by that Act, gives as one example of industrial matters 'the employment of persons in any industry (including the employment of minors, trainees, apprentices and other classes of employees)'. The Queensland *Workplace Relations Act 1997* Chapter 3 ss 115–139 includes provisions relating to the employment of apprentices and trainees and wage rates for juniors, apprentices and trainees in the allowable matters for the award simplification process.[176] The South Australian *Industrial and Employee Relations Act 1994*[177] contains similar but not identical provisions, but the definitions in the Tasmanian *Industrial Relations Act 1984*[178] do not expressly refer to apprentices. The Western Australian *Industrial Relations Act 1979* provides in s 7 that the definition of an employee includes an apprentice or industrial trainee, and that an industrial matter includes:

*(f) in respect of apprentices or industrial trainees—*

*(i) their wage rates and*

*(ii) subject to the Industrial Training Act 1975—*

*(I) their other conditions of employment and*

*(II) the rights, duties, and liabilities of the parties to any agreement of apprenticeship or industrial training agreement*

However, the issue of inconsistency between the legislative provisions relating to apprenticeship in the vocational education and training law and those of the industrial relations legislation is usually resolved by provisions in the former laws that they are to prevail over the latter. The New South Wales *Industrial and Commercial Training Act 1989* s 5 provides:

> *In the event of an inconsistency between:*
>
> *(a) the provisions of this Act, or of any regulation, vocational training order or vocational training direction made under this Act and*
>
> *(b) the provisions of the Industrial Relations Act 1991 or of any regulation, order, award or agreement under that Act,*
>
> *the provisions referred to in paragraph (a) shall prevail to the extent of the inconsistency.*

The Queensland *Vocational Education, Training and Employment Act 1991*, which is likely to be amended in the near future, contains several provisions relating to the conditions of employment of apprentices and trainees.[179] The general effect of these provisions is that if there is no award or industrial agreement which specifically provides for the rates of wages to be paid to an apprentice, then the Industrial Commission will fix a rate based on a percentage of a tradesman's wage. Similarly, the Industrial Commission is empowered to fix other entitlements for apprentices. As far as trainees are concerned the Industrial Commission is also responsible for wages and entitlements, and as a general principle the Commission will fix those wages and conditions relative to appropriate awards or industrial agreements or conditions prescribed in the industrial relations legislation, or other such criteria as it considers appropriate.

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The South Australian *Vocational Education, Employment and Training Act 1994* s 41 provides that this Act prevails:

> *. . . to the extent of any inconsistency over the Industrial and Employee Relations Act 1994 and any regulation, award or other determination, enterprise agreement or industrial agreement made under that Act or an Act repealed by that Act.*

It may be noted that although the Tasmanian *Vocational Education and Training Act 1994* does not contain such a reference, the (Tas) *Industrial Relations Act 1984* s 42(a) provides that the apprenticeship legislation will prevail.

In the Victorian *Vocational Education and Training Act 1990* there are also provisions which expressly incorporate law relating to the conditions of employment of trainees. Section 52 provides that the terms of any training

agreement must not be less favourable to the apprentice than the terms set out in Schedule 3 to the Act. This Schedule applies to any training agreement made after the date of the commencement of the *Vocational Education and Training (State Training Wage) Act 1994*, and with the consent of the parties to any agreement made before that date. The objective of the Schedule:

> *. . . is to assist in the establishment of a system of traineeships which provides approved training in conjunction with employment in order to enhance the skill levels and future employment prospects of trainees, particularly young people and the long term unemployed. The system is neither designed nor intended for those who are already trained and job ready. It is not intended that existing employees shall be displaced from employment by trainees.*

The Schedule covers training conditions, employment conditions and wages and defines its relationship to the *Employee Relations Act 1992*. Declarations may be made by the Minister that specified classes of training agreements are exempt from State Training Wage provisions.[180] It may also be noted that s 50 of the *Vocational Education and Training (Training Framework) Act 1997* has amended s 5(1) of the (Vic) *Accident Compensation Act 1985* to exempt from the WorkCover levy wages paid to apprentices or engaged under a training scheme, declared by the Minister for Finance to be one to which this section applies.

In the Western Australian *Vocational Education and Training Act 1996* s 60 provides that this Act will prevail over the (WA) *Industrial Relations Act 1979* and s 62 provides that the provisions in Schedule 2 of the *Vocational Education and Training Act 1996* amend certain provisions in s 7 of the (WA) *Industrial Relations Act 1979*. These amendments substitute definitions relevant to the former Act in the latter Act.

## 6 Vocational placement regulation

Workplace training is a fundamental element in vocational education and training. If that workplace training is undertaken under the New Apprenticeship System, then its regulation falls within the provisions relating to apprenticeships and traineeships, including the payments to be made to the employee in training, and within the terms of the relevant workers compensation legislation as these relate to persons undertaking apprenticeships and traineeships. However, workplace training may form part of other vocational education and training programs offered by public and private providers to post-compulsory students who are not necessarily undertaking apprenticeships and traineeships under training agreements or training contracts. The VET in Schools School to Work Transition Policy also raises the issue of vocational placements. It is these groups of post-compulsory students which the vocational placement provisions of the VET legislation in Queensland, Tasmania and Victoria are designed to cover. There are no similar vocational placement provisions in the legislation in the Australian Capital Territory, the Northern Territory, New South Wales, South

Australia, and Western Australia, although this does not preclude the making of administrative arrangements to deal with the matters raised by vocational placements.

The Queensland *Vocational Education and Training (Industry Placement) Act 1992*, which is scheduled to be repealed by the Vocational Education and Training Bill 1998 because its provisions are replaced in that Bill, the Tasmanian *Vocational Education and Training Act 1994* and the Victorian *Vocational Education and Training Act 1990* each provides a legislative framework which regulates vocational placements. Although the purpose of each of these Acts is similar the legislative schemes do vary in their detail. The (Qld) *Vocational Education and Training (Industry Placement) Act 1992* s 7 provided that it applied to 'an approved training scheme':

> *. . . whose purpose is to meet that part of a college's course curriculum that requires a student of the college to undertake 1 or more industry placements to satisfy the practical training and experience requirements of the course*

and 'industry placement' is defined in s 8 as:

> *. . . a placement, under an approved training scheme, of a student with an industry placement person for the purpose of providing practical training and experience as part of the student's studies.*

The Tasmanian *Vocational Education and Training Act 1994* provides that 'vocational placement' means 'placement in a vocation which provides paid or unpaid unemployment at the work place as part of an accredited course for a period of less than 240 hours'. Section 86 of the Victorian *Vocational Education and Training Act 1990* refers to the practical placement of students who are 'enrolled in a post-secondary education course of a TAFE provider', and the latter are those providers registered under s 81 of the Act or under s 13D of the Victorian *Adult, Community and Further Education Act 1991*.



The Queensland Act has a fairly broad application,[181] and s 6 provides that certain laws are not to apply to students obtaining industry placement, but under s 6(1) this exclusion does not apply to the *Anti-Discrimination Act 1991*. Under s 6(2) actions contrary to any law which prohibits or regulates the working conditions of persons who are less than a certain age, or of a particular sex or who do not have particular qualifications are not permitted. Further s 6(3) provides that for the purposes of the occupational safety legislation, a student undertaking industry placement is to be taken to be an employee and the relevant industry placement person is taken to be the employer. The legislative scheme regulates the approval of persons with whom the student is placed and the nature of the agreements entered into. The Queensland scheme provides for both paid and unpaid placements. Sections 11 and 12 provide for the distinction between 'vocational placement agreements', which cover a placement for 240 hours or less, and 'vocational training agreements', which cover placements for more than 240 hours. Under s 13 placements for more than 240 hours require a

vocational placement agreement, and under s 14 can be arranged only if the Industrial Relations Commission has made an order as to the appropriate rates of pay and terms of employment of the industry placement student. Section 14 details the matters to which the Commission must have regard in making such an order, and these include the industrial relations legislation. The Queensland *Vocational Education and Training (Industry Placement) Regulation 1993* reg 3 provides for the content of vocational training agreements. Section 15(1) sets out the conditions to which industry placement is subject:

> *(a) if a student is under 18 years—an industry placement may be made only with the written consent of the student's parent or guardian*
>
> *(b) a student must not be provided with unpaid industry placement for more than 240 hours under a single approved training scheme*
>
> *(c) an industry placement of 240 hours or less must start and finish within the academic year of the college attended by the student concerned*
>
> *(d) an industry placement person must not, at any time, provide more than the permitted number of students with industry placement*
>
> *(e) an industry placement student must not perform unpaid work for more than, or outside, the ordinary working hours for the performance of that work or in any way contrary to the terms provided for in awards or industry agreements that are applicable to the workplace concerned*

Section 16(1) provides that the Council may suspend the operation of any conditions in s 13 or s 15(1)(b), (c), (d) or (e) for students with disabilities. Provision is made in s 17 for the amendment and cancellation of agreements. Section 18 provides that an industry placement person providing for an unpaid industry placement of a student is not the employer of the student, and ss 19 and 20 impose obligations on the college in relation to the provision of workers' compensation and indemnity insurance for students taking an unpaid industry placement, and procedural matters are also provided for.[182]

The Tasmanian scheme is different. The *Vocational Education and Training Act 1994* s 45 provides that the Minister may declare 'that a vocation is a vocation in respect of which a vocational placement agreement must be made before an employer may provide a vocational placement', and s 46 provides a statutory penalty if an employer fails to make a vocational placement agreement with a training provider, that is a training provider registered under s 25 of the Act. Section 47 provides for the content of vocational placement agreements:

> *(1) A vocational placement agreement must be in writing and contain provisions relating to the following matters:*
>
> *(a) the accredited course to be provided*
>
> *(b) the duration of the agreement*
>
> *(c) the rights and duties of the parties to the agreement*
>
> *(d) the rights and duties of the trainee*
>
> *(e) any other matter the Training Agreements Committee determines*

*(2) The training provider must forward to the Training Agreements Committee*

*(a) the vocational placement agreement for its approval within 14 days of making the agreement and*

*(b) the approval of any relevant trade union in respect of that agreement*

Section 48 provides for their approval by the Training Agreements Committee, and ss 49 and 50 for the amendment and cancellation of such agreements. Section 51 obliges an employer to provide a person undergoing paid training with workers' compensation cover, and s 52 obliges a training provider to provide indemnity insurance cover for trainees undertaking and unpaid vocational placement.

The Victorian *Vocational Education and Training Act 1990* also has provisions relating to training agreements. Section 87(1) provides that there must be an agreement between the employer and the governing body of the TAFE provider, s 87(2) provides that it must be in writing, consistent with any determinations of the State Training Board, which it is empowered to make under s 88, and that it can be varied or cancelled by either party by notice in writing. Further, the Victorian legislation provides in sub ss 87(3)–(6) that the Governor-in Council may fix the rates of payment for students employed under these agreements, that a student employed under an agreement is entitled to receive that rate of pay, but Commonwealth government departments or bodies are exempted from the requirement to pay students. Section 91AB deals further with the payment of students. Section 91AB(1) provides that:

> *. . . an employer must pay a student the relevant minimum rate of pay that would be applicable under paragraph 1(c) of Schedule 1A to the Workplace Relations Act 1996 of the Commonwealth if the student were an employee within the meaning of Part XV of that Act.*

Subsections (2)–(6) deal with the conditions under which students may be granted certificates of exemption to students by the secretary of the Department of Education and subs (6) provides for the granting of exemption orders to certain classes and students, and subs (7) provides that an exemption order may:



*(a) in the case of any students, provide that the students are not required to be paid for the work and*

*(b) in the case of student required to work more than 240 hours as part of a course requirement, specify the appropriate rate of pay which may be less than the minimum rate of pay that would be the applicable rate of pay referred to in sub-section (1)*

The general effect of s 91AB is that vocational placement students may not be paid where certificates of exemption are issued or exemption orders are made.

The Victorian Act includes provisions relating to actions for negligence which might occur during a practical placement. Section 91A of the *Vocational Education and Training Act 1990* provides:

(1) *A duty which any person has relating to the care or control of a student of a TAFE provider as a student of that provider is to be taken not to apply while that student is employed under an agreement and action does not lie against that person because of a breach of that duty.*

(2) *Sub-section (1) does not extend to a duty which a person has as occupier of the premises of the TAFE provider.*

This provides protection against proceedings for negligence for the TAFE provider and for the employer, a protection which is further enhanced by the prohibition in s 93A which specifically limits the jurisdiction of the Supreme Court 'to the extent necessary to prevent the bringing before the Supreme Court of an action of a kind referred to in s 91A'. However, s 51 of the Victorian *Vocational Education and Training (Training Framework) Act 1997* has amended ss 4 and 7(4A) of the (Vic) *Accident Compensation (WorkCover Insurance) Act 1993* to extend its application to post-secondary students on work experience placement.

In Victoria there is additional legislation relating to vocational placements undertaken as part of a School to Work Transition program. The Victorian Department of Education WorkCover Policy, which has covered both public and private secondary school students on 'work experience', has been extended to cover post-secondary students on practical placement. The *Education (Amendment) Act 1996* amended the *Education Act 1958* provisions relating to work experience undertake by second school students to extend them to students undertaking school to work transition programs to. In s 5(d) the school to work transition programs were defined as 'work placement arrangements' made under s 64LC and distinguished from 'work experience arrangements' made under s 64LB. The new provisions included s 64LC which provides:

(1) *A pupil of a school who is over the age of 15 years and undertaking a course of study accredited by the Board of Studies or the State Training Board may be placed with an employer for training as part of that course of study if the principal or head teacher of the school, the employer, the pupil, and, if the pupil is under the age of 18 years, the parent of the pupil have made an arrangement about the placement of the pupil with the employer.*



Sections 64LC(2) and (3) require that the employer must operate or be in direct control of the skills and training and centre, and for interstate placements. Section 64LD empowers the Minister to make orders about the work placement of pupils. An order may deal with matters such as the requirements to be satisfied for the arrangements to be made, maximum hours and days of employment, daily hours, the maximum number of pupils an employer can employ, the circumstances for the variation, suspension and cancellation of the placement, the minimum rates of payment and any other matters, including interstate placement. Section 64Q(3A) and (3B) provide that where a pupil is employed on a work placement arrangement in a skills or training centre conducted by an employer on a non-for-profit basis, the Minister may determine that the employer is not required to make any payment to the pupil.

notwithstanding anything to the contrary in this Act, or in any law, award or employment agreement. The *Education (Amendment) Act 1996* also amended the *Accident Compensation Act 1985* to redefine 'student worker' in s 5(1)(d) of that Act and made consequential amendments 'to provide Workcover for those pupils entering arrangements with an employer who is a self-insurer within the meaning of the *Accident Compensation Act 1985*' and 'to extend the Workcover provisions applying to work experience arrangements to work placement arrangements'.

# 7 Competition legislation and VET

The legislative basis for the national Competition Policy, the *Competition Principles Agreement* is to be found in the federal *Competition Policy Reform Act 1995* which amended the Principal Act, the (Cwth) *Trade Practices Act 1974* and the (Cwth) *Prices Surveillance Act 1983*. The Conduct Code Agreement, the Competition Principles Agreement, the Agreement to implement the National Competition Policy and Related Reforms were made between the Commonwealth and all the States and Territories on 11 April, 1995, and the provision of financial assistance by the Commonwealth was made conditional on the States' and Territories' implementation of the reforms. The amendments to the Principal Act included *inter alia* new sections, ss 2A-2D, which defined the application of Part IV of the Principal Act to States and Territories and local government bodies. The effect was, in general terms, to apply the provisions of Part IV of the (Cwth) *Trade Practices Act 1974* to the Crown in the right of the States and Territories in any business it carries on directly, or by an authority of the State or Territory.

It is not necessary to explore the complexities of the law relating to competition policy in this project, but it may be noted that all the States and Territories passed laws to apply the Commonwealth law relating to competition policy to the laws in their jurisdiction. These State and Territory Acts are as follows: (ACT) *Competition Policy Reform Act 1996*; (NT) *Competition Policy Reform (NT) Act 1996*; (NSW) *Competition Policy Reform (NSW) Act 1995*; (Qld) *Competition Policy Reform (Queensland) Act 1996*; (SA) *Competition Policy Reform (SA) Act 1996*; (Tas) *Competition Policy Reform (Tas) Act 1996*; (Vic) *Competition Policy Reform (Victoria) Act 1995*; and the (WA) *Competition Policy Reform (WA) Act 1995*. To explore and analyse competition policy is outside the scope of this research, but it is useful to provide an indicative example of how it may be applied to government bodies. In a statement issued by the Victorian Government on competition policy the general aim is to improve economic efficiency 'by reducing the cost of government service delivery by encouraging competition between potential service providers and introducing private provision of services wherever the benefits of improved efficiency and lower cost are apparent'.[185] Among the strategies used to achieve this aim is the introduction of the principle of competitive neutrality to all business activities in government ownership:

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> *The aim of competitive neutrality policy is to ensure that where government's business activities involve it in competition with private sector business activities, the net competitive advantages that accrues to a government business are offset. This will enable the government business and the private sector business to compete 'fairly' on the basis of their relative skills, efficiency, experience and other unique characteristics which make up their business. If the artificial advantages (such as the absence of a requirement to cover the cost of capital) are not explicitly acknowledged and offset, they can hinder the ability of the consumer—be it government on behalf of the taxpayer or the individual consume— to select the provider of goods or services who is genuinely most efficient.*
>
> *Competitive neutrality policy recognises that a public sector business may enjoy an implicit subsidy if there is a failure to recognise the costs borne by its private competitors. If the subsidy is allowed to continue, government businesses will be able to win preference over more efficient private businesses. This 'crowding out' of private sector competition undermines the Government's core objective of focussing on its core activities and promoting private provision where it is efficient to do so.*[184]

This policy is clearly relevant to the VET sector where there is competitive tendering for a significant quantum of funding for programs, that is competitively tendered for by both public and private providers, where the issue of third party access to publicly funded facilities is concerned, and where the introduction of user choice, which is intended to encourage VET consumers to negotiate their training arrangements with individual providers.[185]

Another element of competition policy which is worth noting is that of the separation of the roles of the purchaser and the provider. In 1996 the Ministerial Council of ANTA accepted a report *The implementation of user choice* described the separation of roles in these terms:

> *Public sector managers have two rather different responsibilities: as purchaser of training from a range of providers, both public and private, in the interests of users; and as managers of the public assets in State and Territory TAFE systems. There is potential for conflict between their responsibilities in undertaking these two roles. Where this is an issue, consideration should be given to the separation of the purchaser of training from asset manager roles within the State and Territory Training authorities. (Section 4.9)*[186]



The application of competition policy in the training market is intended to assist the achievement of the Federal Government's primary aim of ensuring that the substantial public and private investment in the Australian training system delivers cost-effective, quality training which is responsive to the needs of its clients, that is, commerce and industry and individual students. The implementation of competition policy in the provision of VET is of course a matter for the individual State and Territory governments, and may not necessarily require amendment of the VET legislation, but what can be said is that at the currency date of 1 March, 1998 there have only been limited legislative changes in the VET legislation related to the implementation of aspects of competition policy. For example, there has been little change to the regulation of

public providers except in Tasmania and Victoria. The *TAFE Tasmania Act 1997* provides for a separation of the purchaser and provider roles, and also in ss 38–40 expressly addresses the issue of third party access. The recent 1997 amendments to the Victorian *Vocational Education and Training Act 1990* s 81 removed restrictions inherent on the conduct of courses by non-college providers and certain exemptions for public providers. However, it must be noted that the legislation in the Northern Territory already allows for the separation of the purchaser and provider roles, and that at the time of writing changes to accommodate this principle in Queensland are foreshadowed in the TAFE Institutes Bill 1997.[187]

# 8 Legislation supporting access and equity

The principle of access and equity in the provision of VET is a clear element of VET policy.[188] It may be noted that in the ANTA Agreement in the Schedule to the *Australian National Training Authority Act 1992* one of its objectives, that which cites the promotion of 'increased opportunities and improved outcomes for individuals and target groups, including school leavers, to enhance their employment outcomes' explicitly invokes this principle. It is repeated in the key objectives of the 1997 ANTA Agreement, which include the objective of overcoming 'the skill development and recognition problems for target groups'. The principle is also expressly acknowledged in the objectives of some of the State and Territory legislation, for example the Australian Capital Territory *Vocational Education and Training Act 1995* s 3(d) which refers to the encouragement within the community of awareness of the need for vocational education and training that is relevant to industry, in the Western Australian *Vocational Education and Training Act 1996*, s 4 of which includes object relating to equality of opportunity to undertake VET, and the Victorian *Vocational Education and Training Act 1990* s 4 of which includes in its objects that of ensuring adequate access to vocational education and training for the disadvantaged. However, there is other legislation of general application in that it does not only apply to the VET sector, which provides additional support to the implementation of the principle of access and equity. There is the federal, State and Territory anti-discrimination legislation, and the federal social security legislation which provides benefits to jobseekers which allow for the undertaking of some education and training, and which also provides benefits to young people to assist them to undertake education and training. Finally, certain legislation which provides benefits to specific groups in relation to education and training may also be briefly noted.



It is not possible within the scope of this project to provide a detailed analysis of the operation of anti-discrimination legislation in Australia, but in general it proscribes discrimination in educational institutions on grounds *inter alia* of sex,

disability, race, sexuality and age, and sexual harassment in educational activities, in the activities of qualifying and vocational training bodies, and the provision of educational services.[189] However, it should be noted that in the Victorian *Equal Opportunity Act 1995* 'education or training in an educational institution' are expressly excluded from the definition of 'services' in that Act.[190] The anti-discrimination legislation although similar is not identical in each jurisdiction. However, the definitions of 'educational institution' or 'educational authority' cover schools, colleges, universities or other institutions at which education and training is provided, and the legislation applies to private as well as to public educational institutions. Both direct and indirect discrimination are proscribed. This legislation provides comprehensively in each jurisdiction for the administration of the legislation, for the conciliation of complaints as well as for the powers of tribunals or boards to determine complaints. It may also be noted that the Commonwealth legislation makes it unlawful for discrimination to occur in an educational program funded by the Commonwealth. However, all the legislation provides for certain exemptions from its operation, and for the protection of programs intended to redress inequality and to achieve equality.

Federal social security law also provides support for the principle of access and equity in the provision of VET. The (Cwth) *Employment Services Act 1994* provided the statutory basis for the establishment and regulation of administrative structures, including the Commonwealth Employment Service and the Employment Services Regulatory Authority, and for the procedures which were to be followed in providing assistance to unemployed persons to gain access to employment through the development of job search skills and vocational skills if they were needed. From 1 May, 1998 new arrangements, developed through the exercise of executive power, will apply. This work will be carried out by a corporatised body, Employment National, and a variety of organisations, including both public and private providers. The conditions governing the provision of these services will be defined in the contractual arrangements made between DEETYA and the providers.[191] It is unclear how the interface between this aspect of social security law and education and training will develop in the future, and this remains a subject for future research.



The provision of benefits to students under s 51(pl xxiiiA) of the Constitution finds a direct expression in another element of social security law. The current legislation is the *Student and Youth Assistance Act 1973* and the *Social Security Act 1991*. The provisions in this legislation relating to youth training allowances will be repealed and replaced by the Social Security Legislation Amendment (Youth Allowance) Bill 1997 which is currently before the Federal Parliament.[192] The rationale for the amending legislation, which introduces the Youth Allowance (YA) is explained in these terms in the Explanatory Memorandum:

- *YA will provide a comprehensive coverage of income support for young people, thereby both substantially reducing the number of different rates of payment, and addressing public concerns about the current fragmentation of income support*

*arrangements between the Departments of Social Security and Employment, Education, Training and Youth Affairs.*

- *YA removes undesirable incentives for young people to leave education or to choose unemployment over education and training.*
- *YA reinforces the Government's philosophy that families should support young people until they have achieved financial independence.*
- *Given the range of education, training, work and employment options available to, and experienced by, young people the current arrangements are too inflexible to cater for increasing numbers of young people who do not follow the traditional route from full-time study to full-time employment.*
- *YA will provide increased assistance for young students who need to live away from home, especially those from rural areas.*[193]

Schedule 1 of this Bill deals with the Youth Allowance and, in summary, it is proposed that the YA will replace the current Youth Training Allowance, the NewStart Allowance, and the Sickness Allowance presently available to persons aged between 16 and 20 years, and AUSTUDY for students aged between 16 and 24 years (inclusive), and older if the student commences the course before the age of 25, and 15 year olds who may be currently eligible for AUSTUDY benefits. There are also changes relating to family income tests. The YA will be based on many of the rules which currently apply to the YTA, NSA, SA and AUSTUDY: for example, the basis of entitlement and the fortnightly payment system, an activity test which 'can be satisfied in a variety of ways including by looking for full-time employment, studying full-time, undertaking a course of vocational training or undertaking an approved combination of part-time activities', and exemptions from this activity test will be available in certain circumstances.[194] However, certain current benefit schemes will continue to exist, for example ABSTUDY, the Assistance for Isolated Children Scheme, the Disability Support Pension, the Sole Parent Pension, the Parenting Allowance, the Special Benefit and wage top-up agreements for apprentices and trainees.[195]



Finally, there is Commonwealth legislation which is concerned to improve the access of certain groups within the Australian community to education and training, which may be briefly noted, although it is not examined in detail in this project. The *Indigenous Education (Supplementary Assistance) Act 1989* is directly concerned in its objects to promote participation in education by indigenous people.[196] It may also be noted that, in addition to the *Tradesmen's Rights Regulation Act 1946*, which provides a mechanism for the recognition of trade qualifications and experience gained outside Australia, under the migration legislation administrative provision has been long established for the recognition of overseas gained qualifications and for the teaching of English language skills to migrants on their arrival in Australia.

# 9 VET and international law

The Commonwealth external affairs power in s 51 (p. xxiv) of the Constitution can be used to incorporate international conventions into Australian law and the latter can be relevant to the provision of vocational education and training. Some examples may be noted. The Commonwealth and State and Territory anti-discrimination legislation, which gives effect to the ILO Convention on Discrimination (Employment and Occupation) 1958 covers discrimination in access to vocational training. The United Nations Convention on the Elimination of all Forms of Racial Discrimination 1963 and the United National Convention on the Elimination of all Forms of Discrimination against Women, which proscribe discrimination in education are also given effect to by the anti-discrimination legislation. Further, Schedule 16 of the (Cth) *Workplace Relations Act 1996* which incorporates the Preamble and Articles 1 to 6 of the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively is another example of relevant international law. The ILO Convention on Human Resources Development 1975 was ratified by Australia in 1985, and given effect to initially in the contemporary federal legislation including the *Employment, Education and Training Act 1988* and the *States Grants (Technical and Further Education) Act 1989*, as well as in the education legislation, including that relating to vocational education and training, in the Australian Capital Territory, the Northern Territory, New South Wales, Victoria, Queensland, South Australia, Tasmania, Victoria and Western Australia. Finally, the ILO Convention on Vocational Rehabilitation and Employment (Disabled Persons) 1983, which *inter alia* was concerned to promote the availability of rehabilitation and of employment opportunities for disabled persons in the open labour market, was ratified by Australia on 7 August, 1990 and has been given effect to by anti-discrimination legislation in the federal jurisdiction and in the Australian Capital Territory, the Northern Territory, New South Wales, Queensland, South Australia, Victoria and Western Australia, and by industrial relations legislation in the federal jurisdiction, New South Wales, Queensland, South Australia and Victoria.[107] Of course, international law is not self-executing in Australia. The ratification by Australia of an international convention does not make that convention part of Australian law. The convention does not become part of Australian municipal law unless it is specifically given effect to by the Australian Federal Parliament by incorporation in legislation passed by that Parliament.[108]



# 10 Conclusion

This survey of the legal framework of VET has examined the Commonwealth and State and Territory legislation which provides the statutory framework for the National Training Policy, the regulation of the public providers of TAFE and the statutory bodies other than those dealing with apprenticeship and the

administration of the public providers of TAFE. It has also examined the legislative framework for the regulation of apprenticeship and training and the regulation of vocational placement in industry. The legislation for competition policy reform has been described, and very briefly legislation which supports the implementation of the principle of access and equity in education and training has been noted. In this survey the legislative instruments described have been chiefly statutes, and, where appropriate, subordinate legislation has been noted.

It is evident that the statutory framework for VET has diverse jurisdictional origins which are inevitable in the Australian federal system. Traditionally, historical, geographical, economic, political and demographic factors have influenced the kinds of legislative policies of the States and Territories. This means that the statutory framework for VET is also relatively complex because the legislation across the jurisdictions, although similar, is not identical and no single legislative model has emerged. The dedicated VET legislation is essentially concerned with the establishment of organisational structures for the administration and provision of VET, and with the allocation of powers, executive and legislative, for the implementation of the legislation. The constitutional context of the regulation of VET is also of significance. Insofar as the development of the National Training System is concerned it is desirable that both the federal and State and Territory statutory frameworks should be able to accommodate the policy changes. This has been done by developing statutory structures to facilitate the co-operative development of National Training Policy and the use of Ministerial executive powers to implement agreed policies. This development reflects the constitutional reality that although the development of a National Training Policy for the provision of vocational education and training can be driven by the use of the Commonwealth's financial powers, the Commonwealth lacks constitutional authority to implement it unilaterally. When policy changes in VET are introduced, it is inevitable, given the Australian federal structure and the constitutional context for the provision of vocational education, that the statutory framework undergoes a period of transition. This is presently the case with respect to the new training policy.



One characteristic of the State and Territory VET legislative frameworks is that they have been concerned, chiefly, but not exclusively, with the regulation of public providers, and particularly with the processes of the accreditation of courses and the registration of providers to offer those courses. However, these latter processes have consequentially involved the regulation of private providers. With the emphasis in the National Training Policy upon the registration of training organisations, and their accreditation as assessors of competencies rather than upon the accreditation of courses, with concern for curriculum content, the traditional legislative provision for accreditation of courses and the registration of providers is not an exact template for new policy emphases. Nevertheless, as it adapts, the regulatory framework will continue to cover both public and private providers of VET.

Further, there are clear interfaces between this field of law and other fields of law. Competition policy legislation is a recent development, but it is already clear that it will impact upon the operation and implementation of the legislative framework of VET, although the final extent of any changes which might be made in the VET legislation governing the organisational structures of the provision of VET is not yet clear. The interface between VET law and legislation which supports principles of access and equity has been briefly noted. The significance of anti-discrimination law for the VET sector, as for other educational sectors, is well established, and it will remain an important element in the VET legislative framework. Equally well established is the interface between social security law and the operation of the VET sector. However, the social security legislation relating to the provision of assistance to jobseekers and to the provision of benefits for students is itself in a transitional phase, and there is presently insufficient information available to indicate how the developing law will affect the legislative framework of the VET sector.

The most important interface is that between the law relating to VET and industrial law, particularly in the matter of the regulation of apprenticeships. Traditionally, there has been a consonance between the VET law regulating apprenticeships and the body of industrial law, including awards and agreements, which also regulate apprenticeships. It is fair comment that the regulation of apprenticeships has been limited to certain trades, and that it can reasonably be characterised as having been regulated by a detailed and comprehensive regulatory scheme, which regulated the entry to those trades, and emphasized supervision of both on-the-job practical training and off-the-job theoretical training, for both of which the apprentice was paid. A significant change in the policy which determines how apprenticeships are to be regulated, such as that introduced by the New Apprenticeship System, which is to be characterised by flexibility in its non-prescriptive mix of on-the-job practical training and off-the-job theoretical training, in its reliance upon competencies achieved rather than time served training, its much broader application to all occupational training, and its introduction of the possibility of part-time as opposed to full-time apprenticeship training, necessarily raises issues of how the VET law regulating apprenticeships and the industrial law regulating apprenticeship are to be brought into alignment. It cannot be said that at the time of writing that this process has been completed across the several jurisdictions, and whether or not the flexibility and broader application of the New Apprenticeship System will make the alignment process more complex is not yet clear. The legislative regulation of vocational placements for post-compulsory students in both secondary schools and TAFE institutes, which has been developed only in some jurisdictions, is a further aspect of the interface between industrial law and the provision of VET. The growth of VET in the School to Work Transition policy during the past decade has been significant. What remains to be seen is whether or not the other jurisdictions will consider it

necessary to develop legislative regulation of vocational placements for post-compulsory student.

Finally, the point may be made that at the end of the twentieth century the historical underlying theme in the development of the legal regulation of vocational education and training, namely that an effective national system of vocational education and training to ensure that Australia has an appropriately skilled labour force is necessary to develop the national economy, remains a key catalyst for the development of new policies in vocational education and training and for the ongoing development of the regulatory framework for vocational education and training in the Commonwealth and in the States and Territories.

# Endnotes

1 See above, Chapter Two, Historical overview. pp.36–46.

2 See above, Chapter Two, Historical overview, pp.30–32.

3 Freedland, M, 'Leaflet law: The temporary short time working compensation scheme', in *Industrial Law Journal*, vol.9, no.4, pp.254–258 and Freedland, M, ' Labour law and leaflet law: The Youth Training Scheme of 1983', in *Industrial Law Journal*, vol.12, no.4, pp.220–235.

4 Ministerial orders or declarations are essentially directions given by the Minister responsible for the administration of a particular law, and should not be confused with declarations or orders made by courts and tribunals.

5 For a brief discussion of some of the implications arising from this type of regulation, see Chapter Seven, Conclusion, pp.253–254.

6 See above, Chapter Two, Historical overview, pp.41–42. See also Chapter Five, section 8, Legislation supporting access and equity.

7 See above, Chapter Two, Historical overview, pp.36–46.

8 It has been noted above in Chapter Two, Historical overview, at pp.41–42, that the (Cwth) *Employment, Education and Training Act 1988* originally set up federal government structures for the ongoing development of national education policies generally, and through amendments which developed its arrangements for advisory councils, subsequently provided for all education sectors. The Education and Training Amendment Bill 1996 provided for the abolition of the National Board of Employment, Education and Training, the Schools Council, the Employment and Skills Formation Council, and the Australian Language and Literacy Council. If this amending bill is passed, then the current and future operation of the *Employment, Education and Training Act 1988* will apparently be limited to the operation of the higher education sector. However, a report in *The Australian*, 26 November, 1997 indicated in relation to the foreshadowed changes to this Act that 'it is understood that the Education Minister David Kemp is considering establishing a body that would take in the vocational education and training sector as well as higher education'. The final outcome of the proposed amending bill is not known at the time of writing, and the relevance of the Act to the VET sector seems problematic, and consequently is not discussed in detail.

9 It is understood that a revised Agreement is being developed, but the details have not been published at the time of writing.

10 See (Cwth) *Commonwealth Authorities and Companies Act 1997* s 5 (definitions), s 7 (meaning of Commonwealth authority), ss 21–27 (conduct of officers), s 34 (meaning of Commonwealth company and wholly-owned Commonwealth company; see also, Skehill, S 1998, 'Officers are well advised to be well advised,' *Australian Financial Review*, 6 March, 1998, for a brief commentary on the implications of this legislation.

11 The *Vocational Education and Training Funding Act 1992* amended the then principal Act, the *States Grants (TAFE Assistance) Act 1989* to provide for the funding of vocational education and training after 1993. Section 3 provided that the 'Principal Act' meant the *States Grants (TAFE Assistance) Act 1989*, but in subsequent amending legislation such as the *Vocational Education and Training Funding Laws Amendment Act 1993*, s 3, and the *Vocational Education and Training Funding Amendment Act 1994*, s 1(2), the *Vocational Education and Training Funding Act 1992* is itself expressed to be the 'Principal Act'. However, by convention, because it is an Act which appropriates funding, the 1989 Act has not yet been repealed.

12 (ACT) *Vocational Education and Training Act 1995* s 3; (NSW) *Industrial and Commercial Training Act 1989* s 3; (NSW) *Vocational Education and Training Accreditation Act 1990* s 3; (Vic) *Vocational Education and Training Accreditation Act 1990* ss 1, 4(a)–(j).

13 For a contemporary restatement of these objects, see the reference to the consultation draft of the (Qld) Vocational Education and Training Bill 1997 in Chapter Six, Vocational Education and Training: Law and Policy—An Examination, pp.221–222.

14 (ACT) *Vocational Education and Training Act 1995* s 5.

15 (NT) *Northern Territory Employment and Training Authority Act 1991* s 5.

16 (Qld) *Vocational Education, Training and Employment Act 1991* ss 6 (constitution), 11A (Commission is a statutory body).

17 (SA) *Vocational Education, Employment and Training Act 1994* s 7.

18 (Tas) *Vocational Education and Training Act 1994* s 6(1) continued the Tasmanian State Training Authority established under the *Tasmanian State Training Authority Act 1994*.

19 (Vic) *Vocational Education and Training Act 1990* s 8.

20 (WA) *Vocational Education and Training Act 1996* s 18.

21 These boards are the Vocational Training Board established under the *Industrial and Commercial Training Act 1989* ss 16–18, the TAFE Commission, established under the *Technical and Further Commission Act 1990* s 4, and the Vocational Education and Training Accreditation Board established under the *Vocational Education and Training Accreditation Act 1990* s 5(1).

22 (Vic) *Vocational Education and Training Act 1990* s 13; (WA) *Vocational Education and Training Act 1996* s 19(3).

23 (NSW) *Board of Vocational Education and Training Act 1994* s 5.

24 (ACT) *Vocational Education and Training Act 1995* s 40; (NT) *Northern Territory Employment and Training Authority Act 1991* s 8; (Qld) *Vocational Education, Training and Employment Act 1991* s 7; (SA) *Vocational Education, Employment and Training Act 1994* s 7; and (Tas) *Vocational Education and Training Act 1994* s 6(2).

25 (ACT) *Vocational Education and Training Act 1995* ss 42–48 and s 65; (NT) *Northern Territory Employment and Training Authority Act 1991* ss 85–88; (NSW) *Board of Vocational Education and Training Act 1994* s 11; (Qld) *Vocational Education, Training and Employment Act 1991* ss 22–30; (SA) *Vocational Education, Employment and Training Act 1994* s 7(9) and Schedule 1; (Tas) *Vocational Education and Training Act 1994* s 6(7) and Schedule 1, cls 1-6 and s 79(a); (Vic) *Vocational Education and Training Act 1990* ss 14–15 and s 22; (WA) *Vocational Education and Training Act 1996* ss 19–20 and Schedule 1, and ss 63–64.



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26 (ACT) *Vocational Education and Training Act 1995* ss 7–8 and 49–53; (NT) *Northern Territory Employment and Training Authority Act 1991* ss 9–13; (NSW) *Board of Vocational Education and Training Act 1994* s 7 and Schedule 1; (Qld) *Vocational Education, Training and Employment Act 1991* ss 12–13, (SA) *Vocational Education, Employment and Training Act 1994*, ss 9–10; (Tas) *Vocational Education and Training Act 1994* s 7 and Schedule 1, cls 7–13; (Vic) *Vocational Education and Training Act 1990* ss 10–12, 16, 18–19; (WA) *Vocational Education and Training Act 1996* ss 21–24.

27 (ACT) Vocational Education and Training Act 1995 ss 51 and 54–57; (NT) Northern Territory *Employment and Training Authority Act 1991* ss 15–17; (NSW) *Board of Vocational Education and Training Act 1994* ss 9–10; (Qld) *Vocational Education, Training and Employment Act 1991* ss 13 and 22–30; (SA) *Vocational Education, Employment and Training Act 1994*, s11; (Tas) *Vocational Education and Training Act 1994* s 8; (Vic) *Vocational Education and Training Act 1990* ss 20, 20A, 20AA, 20B, and 21; (WA) *Vocational Education and Training Act 1996* ss 22-24.

28 See, for example, (ACT) *Vocational Education and Training Act 1995* s 7; (NT) *Northern Territory Employment and Training Authority Act 1991* s 6(a), (e), and (f); (NSW) *Board of Vocational Education and Training Act 1994* s 6(b), (i), (j) and (k); (Qld) *Vocational Education, Training and Employment Act 1991* s 9(g); (SA) *Vocational Education, Employment and Training Act 1994*, s 9(6); (Tas) *Vocational Education and Training Act 1994* s 7(1)(h); (WA) *Vocational Education and Training Act 1996* s 21(b).

29 (ACT) *Vocational Education and Training Act 1995* s 50; (NT) *Northern Territory Employment and Training Authority Act 1991* s 14; (NSW) *Board of Vocational Education and Training Act 1994* s 7(2); (Qld) *Vocational Education, Training and Employment Act 1991* s 8; (SA) *Vocational Education, Employment and Training Act 1994*, s 8; (Tas) *Vocational Education and Training Act 1994* s 5; (Vic) *Vocational Education and Training Act 1990* ss 5–6B and 12; (WA) *Vocational Education and Training Act 1996* s 14.

30 For discussion of the establishment and work of other statutory bodies in the State and Territory legislation, see Chapter Five, Section 4, Statutory bodies for accreditation and registration of providers and other statutory bodies, pp.158–162.

31 (ACT) *Vocational Education and Training Act 1995* s 68; (NT) *Northern Territory Employment and Training Authority Act 1991* s 98; (Qld) *Vocational Education, Training and Employment Act 1991* s 126; (SA) *Vocational Education, Employment and Training Act 1994* s 47; (Tas) *Vocational Education and Training Act 1994* s 83; (Vic) *Vocational Education and Training Act 1990* s 94; (WA) *Vocational Education and Training Act 1996* s 67. There is no provision relating to the making of regulations in the (NSW) *Board of Vocational Education and Training Act 1994*.



32 These figures are derived from the list of Australian State and Territory TAFE directors and chief executive officers, as at August 1997, compiled by the Victorian Association of Directors of TAFE Institutes Inc. (VicAD), supplied by the NCVER Ltd, Adelaide.

33 (ACT) *Canberra Institute of Technology Act 1987* ss 4–5.

34 (ACT) *Hotel School Act 1996* s 4 (continuation of former School).

35 (ACT) *Canberra Institute of Technology Act 1987* s 5.

36 (ACT) *Hotel School Act 1996* s 5.

37 (ACT) *Canberra Institute of Technology Act 1987* ss 9–13; (ACT) *Hotel School Act 1996* ss 7–10.

38 (ACT) *Canberra Institute of Technology Act 1987* ss 14–22.

39 (ACT) *Hotel School Act 1996* ss 23–27 and Sched 2.

40 *Ibid.* ss 28–35.

41 (ACT) *Hotel School Act 1996* ss 11–22 and Sched 1.

42 *Ibid*. s 7.

43 (ACT) *Canberra Institute of Technology Act 1987* s 49 (Institute staff to be employed under the ACT *Public Sector Management Act 1994*), s 51 (requirements for management of personnel in Institute); (ACT) *Hotel School Act 1996* s 28 (School may employ persons on terms and conditions determined in writing by the Board, s 29 (School may employ consultants).

44 (ACT) *Canberra Institute of Technology Act 1987* ss 52–63, including s 53 (charging of fees), s 56 (application of money), s 60 (financial reporting) and s 61 (audit requirements); (ACT) *Hotel School Act 1996* ss 30–34 including s 30 (fees payable to Schools), s 31 (money of the School), s 32 (liability for ACT taxes) s 33 (application of money), s 34 (trust money), s 35 (application of *Financial Management Act 1996*).

45 (ACT) *Canberra Institute of Technology Act 1987* s 62 (Director's power of delegation), s 63 (notification of Director's decisions relating for example to the admission of students and the conferral of awards), s 64 (review of those decisions by the ACT Administrative Appeals Tribunal), and s 65 (regulations); (ACT) *Hotel School Act 1996* s 36 (Director and Board immunity from suit), s 37 (Executive may make regulations).

46 See (NSW) *Technical and Further Education Commission (Savings and Transitional) Regulation 1993* (No 504 of 1993); (NSW) *Technical and Further Education Commission (Student Discipline) Regulation 1994* (No 477 of 1994); (Qld) *Vocational Education, Training and Employment Commission Rule 1992* as amended by No 412 of 1995 and the *Vocational Education, Training and Employment Regulation 1991* as amended by No 300 of 1995 and No 284 of 1996; (SA) *Technical and Further Education Regulations 1997* (No 197 of 1997); (WA) *Vocational Education and Training Regulations 1996* No 204 of 1996) (*Western Australian Government Gazette*, 27 December, 1996), the *Vocational Education and Training Amendment Regulations 1997* and the *Vocational Education and Training Amendment Regulations (No 2) 1997*) (*Western Australian Government Gazette*, 7 November, 1997); (WA) Ministerial Instruments required under *Vocational Education and Training Act 1996*, s 10 such as the *Delegation of Functions Instrument (No 2) 1997* (*Western Australian Government Gazette*, 4 April, 1997), Ministerial Directions made under s 11 of the Act, such as the *Colleges Directions 1997*, 6 January, 1997, and Ministerial Orders, such as the *Vocational Education and Training (TAFE International WA) Order 1997*, 17 June, 1997, and the *Colleges (Additional Functions) Order 1997*, 17 June 1997.

47 See, for example, (WA) *Public Training Providers Guidelines (N0 2) 1997*, which relate to activities provided by vocational education and training and related services provided by public training providers outside Australia.

48 (Qld) *Vocational Education, Training and Employment Act 1991* ss 49–51 (employment of staff and other persons to be under the *Public Sector Management and Employment Act 1988*); (WA) *Vocational Education and Training Act 1996* s 46 (appointment of managing directors), s 47 (appointment of college employees, who come under the *Public Sector Management Act 1995*).

49 (NSW) *Technical and Further Education Commission Act 1990* ss 13, 14 (appointment of Managing Director of TAFE Commission), ss 15–16 (appointment of staff, incl subs 16(2), staff are 'employees of the Crown for the purposes of *Industrial Arbitration Act 1940* or any other Act'), ss 17–22 (appointments, promotions retirement of incapable officers, extended or long service leave.); (SA) *Technical and Further Education Act 1975* s 15 (appointment of officers to provide technical and further education), ss 15A–17A (termination of appointments, retrenchment, incapacity of officers, and for appeal against termination, retrenchment, transfer or retirement), ss 19–24 (long service leave provisions), s 25 (officers may retire on or after reaching the age of 55 years), ss 26–27

(grounds upon which disciplinary action may be taken, penalties which may be imposed, and Appeal Board procedures), s 39A (remuneration for part-time officers), and s 40A (statutory offences of insulting officers and employees).

50 (Qld) *Vocational Education, Training and Employment Act 1991* s 52(2) (councils to be established in the manner decided by the Minister with representation according to s 52(3), s 53 (functions of councils), ss 54–58 (appointment and removal of members, vacancies); (Qld) *Agricultural Colleges Act 1994* s 6 (Board of Trustees), s 7 (functions of college board), s 8 (powers of college board), s 11 (power of delegation), ss 12–18 (membership of boards), ss 19–20 (chairperson and deputy chairperson), ss 21–23 (procedures), s 24 (entitlements of board members), 25 (training of board members).

51 (SA) *Technical and Further Education Act 1975* s 28 (establishment by Minister, appointment in accordance with regulations), s 33 (Minister's power to abolish a council if the college for which it is established is to be closed).

52 (WA) *Vocational Education and Training Act 1996* s 36(1) (college consists of governing council, staff and enrolled students), s 36(2) (college is a body corporate), s 37 (functions of college), s 38 (Minister may by order published in the *Gazette* determine the colleges' vacation periods), s 48 (definition of college funds).

53 (Qld) *Vocational Education, Training and Employment Act 1991* s 53 (functions of councils), s 109 (holders of office to act honestly and with propriety), s 125 (indemnity to persons administering the act); (Qld) *Agricultural Colleges Act 1994* s 9 (college board to promote interests of college), 10 (college board subject to written Ministerial directions).

54 (SA) *Technical and Further Education Act 1975* s 29 (councils to be bodies corporate), s 30 (borrowing power, but only to be exercised with the approval of the State Treasurer and in accordance with administrative instructions issued by the chief executive officer), s 31 (Minister can make a grant or loan to a council), s 32 (duty to account for money received), s 32A (duty to report annually on their financial position).

55 (WA) *Vocational Education and Training Act 1996* s 39 (constitution—members appointed by Minister, director as *ex officio* member), s 40 (Schedule 1, dealing with vacation of officer, disclosure of interests, and procedures for meetings, has effect with respect to councils), s 41 (appointment of interim governing councils on establishment of colleges), s 42 (functions of council), s 43 (powers of council), s 44 (power to make by-laws for safe operation of college and for membership and functions of student associations), s 45 (council's power of delegation, and managing director's power of sub-delegation), s 55 (Minister may take action where governing council fails to operate efficiently or effectively), s 56 (Minister may appoint another governing council or an administrator), s 63 (remuneration of members of councils), s 64 (protection from liability for acts and omissions done in good faith performing or purporting to perform functions under the Act).

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56 (Tas) *TAFE Tasmania Act 1997* s 6 (TAFE Tasmania is a body corporate), subss 7(a)–(d) (functions), s 8 (powers of TAFE Tasmania in relation to commercial activities and the acquisition and disposal of real property), ss 16–18 (responsibilities and powers of the chief executive officer of TAFE Tasmania), ss 19–24 (financial powers of TAFE Tasmania), ss 25–33 (the requirements as to accounting records, statements and reports), s 41 (transfer of Crown land to TAFE Tasmania), s 42 (Governor may make regulations).

57 *Ibid.*, s 9, (Minister to appoint six directors and the chief executive officer of TAFE Tasmania is to be an *ex officio* member), s 10 (responsibilities of Board), s 11 (Board's powers of delegation), s 12 (direction by Minister), s 13 (appointment of acting directors), s 14 (duties of directors), s 15 (repayment of improper profit), Schedule 1

(terms and conditions of appointment of directors), Schedule 2 (procedures for Board meetings and directors' duty of disclosure of pecuniary interests, direct or indirect).

58 *Ibid.* s 34 (audit committee and its functions), s 35 (advisory committees), s 43(a)–(c) (power to make by-laws).

59 *Ibid.* s 37(1) (employees to be employed in accordance with the *Tasmanian State Service Act 1984*), subss 37 (2)–(3) (TAFE Tasmania, with permission of the Minister may employ other staff to whom the Act does not apply).

60 *Ibid.* ss 38–40.

61 (Vic) *Vocational Education and Training Act 1990* s 28 (membership to include elected representative members, *ex officio* members, and members appointed by the Minister), ss 29, 29A, (terms and conditions of office of members), s 30 (proceedings of councils), and s 37 (immunity against suit for actions taken in good faith by council members, except for actions taken under s 26(2), which enables a council to participate in the formation of companies, associations, trusts, partnerships and joint ventures).

62 *Ibid.* ss 31–33.

63 *Ibid.* s 34A(1) (council to employ college director and college staff), s 34A(2) (council in employing persons under this section does not represent the Crown), s 34A(3) (the college director is the employer), s 34B (Minister may object to an appointment of a college director), s 34C(1) (invokes Schedule 2 of the Act, which relates to saving of superannuation benefits for staff employed prior to the passing of the *Vocational Education and Training (College Employment) Act 1993*), s 34C(2) (TAFE college council to determine terms and conditions of employment of staff), s 34C(3) (such terms and conditions are of no effect if they are less favourable than the terms and conditions to which the person was entitled under ss 19, 20 and 21 of the *Vocational Education and Training (College Employment) Act 1993*), s 35 (responsibilities of college directors). See also *Model Constitution for TAFE College Councils*, (Victoria, Office of Training and Further Education, 1994)

64 Much of the subordinate and quasi-legislation in Victoria is provided through Ministerial orders and executive memoranda. The latter are too numerous to detail, but cover a variety of matters including current policy developments. Some indicative Ministerial orders may be noted. The Ministerial Directions to Councils of TAFE Institutes and Universities with TAFE Divisions (December, 1995), made pursuant to the *Vocational Education and Training Act 1990* ss 6 and 6A, the *Financial Management Act 1994* s 51, the *Public Authorities (Equal Employment Opportunity) Act 1990* s 14 are made after consultation with the State Training Board, and cover performance agreements in relation to services purchased by the State Board from the Councils, Management Plans prepared by the Councils under s 25(1)(a) of the *Vocational Education and Training Act 1990*, fees and charges, compliance with Commonwealth/State Agreements, the standard and general form of accounts which must be in accordance with the requirements of the *Financial Management Act 1994*, the inspection of councils' facilities, accounts and records by persons authorised by the Minister, the formation of companies under the power granted TAFE institute councils under s 26(2) of the Act, the reports which the councils must provide to the Minister must be provided in accordance with the guidelines issued from time to time by the Minister, and finally directions as to the employment of staff and the management of employee relations. Schedule 1 to the order provides more detailed directions about fees and charges, Schedule 2 about the reporting requirements and Schedule 3 about the employment of staff and the management of employee relations, which spell out matters such as the extent of the councils; authority to act under the industrial relations legislation and the matters which must be contained in employment agreements or council determinations, for example, leave provisions, portability of

entitlements and so on. Special clauses in Schedule 3 relate to the appointments of executive officers. The related TAFE Management Staff Positions Order 1995 (December, 1995), declares certain positions and classes of positions to be management positions in institutions.

65 (Vic) *Vocational Education and Training Act 1990* s 81(1) and (1a) (registration of providers of recognised qualification), subs 81(2)(b) (qualification or class of qualifications determined by the Board), subss 81(3)(a)–(n) (revised list of criteria to which the Board must have regard in the recognition of providers), subs 81(5) (period of recognition extended from 3 to 5 years).

66 (NT) *Education Act 1979* s 51 (appointment of Director), s 52(1) (appointment of other staff by a college council), s 52(2) (terms and conditions of employment are to be approved by the Commissioner within the meaning of the *Public Sector Employment and Management Act*), s 52(3) (Subsections (1) and (2) do not apply to a college that is an Agency within the meaning of the *Public Sector Employment and Management Act*).

67 (NT) *Education Act 1979* s 44 (college affairs to be conducted by its council), s 45 (composition of council includes *ex officio* and representative members and members appointed by Minister), s 46 (terms of office of appointed and elected members), s 47 (removal from office and filling of casual vacancies).

68 (NT) *Education Act 1979* s 48 (council meetings and procedures), s 49 (power to establish committees), s 50 (obligation of disclosure of interests).

69 (NT) *Education (College and School Councils) Regulations, 1983–1991.*

70 See also: (Vic) *Victoria University of Technology Act 1990* s 27 (the Technical and Further Education Division), s 32 (the Board of Technical and Further Education), s 33 (chairperson and deputy chairperson), 34 (powers of the Board), s 34A (resolutions without meetings of the Board of Technical and Further Education), s 34B (approved methods of communication of Board of Technical and Further Education); s 35 (power of the Council to make statutes), s 36 (statutes and regulations affecting courses of study); (Vic) *Royal Melbourne Institute of Technology Act 1992* s 31(1) ( the Technical and Further Education Division), s 31(2) (Board of Technical Studies to be part of this), s 31(3) (power of Council to make statutes), s 32 (Board of Technical Studies), s 32A (resolutions without meetings of Board of Technical Studies), s 32B (approved methods of communication for Board of Technical Studies meetings); (Vic) University of Ballarat Act 1993 s 29C (TAFE Division established), s 29D (Board of Technical and Further Education), s 29E (chair and deputy chair), s 29F (powers of Board), ss 29G, 29H (procedures for meetings), s 29I (Board of Technical Studies), ss 59–70 (provisions relating to merger with TAFE institutes).



71 (Vic) *Swinburne University of Technology Act 1992* ss 34A and 34B provide for variations in the procedures for meetings.

72 The (Vic) *Melbourne University (VCAH) Act 1997* s 1 of which provides that the main purpose of the Act is to provide for the merger of the Victorian College of Agriculture and Horticulture with the University of Melbourne, in ss 4 and 5 transfers the assets and liabilities. and gifts or trusts, of the Company, the VCAH Ltd, to the University of Melbourne. Under s 6 the staff of the VCAH become members of the staff of the University, and under s 7(1) the students of the VCAH become students of the University. Under subss 7(2) and (3) the University is empowered to confer awards upon the students of the VCAH, and *inter alia* in s 11 the rules of the Company, to the extent that they are not inconsistent with the regulations of the University of Melbourne, continue to have effect as if they had been made as regulations of the University and can be so amended or revoked.

73 (NSW) *Board of Adult and Community Education Act 1990* s 4 (establishment), s 5 (membership), s 6, Sched 1 (terms and conditions of appointment of members), s 11 (exclusion of liability of members).

74 (SA) *Vocational Education, Training and Employment Act 1994* s 16 (establishment, membership, Sched 1 to apply in relation to the terms and conditions of appointment).

75 (Vic) *Council of Adult Education Act 1981* s 3 (establishment), s 6 (membership of Board), s 7 (terms and conditions of appointment), s 8 (appointment of Chairperson and Deputy Chairperson), s 10 (disclosure of interests by members).

76 (Vic) *Adult, Community and Further Education Act 1991* s 5 (establishment), s 19 (membership), s 20 (terms and conditions of appointment of members), s 21 (acting members), s 32 (members immunity from suit).

77 *Ibid.* s 33 (Minister obliged to establish the regions), s 34 (Minister to appoint a council for each region), s 37 (accountability to Board and general direction and control of Minister), ss 38, 39 (membership of the Regional Councils), s 41 (incorporation of Regional Councils), s 42 (members immunity from suit).

78 (NSW) *Board of Adult and Community Education Act 1990* s 7(1) (functions), s 8 (Board to prepare annual strategic plan for Minister); (SA) *Vocational Education, Training and Employment Act 1994* s 17 (Ministerial control), s 18(1) (functions), s 19 (obligation to prepare annual report for Vocational Education, Employment and Training Board for presentation to Minister); (Vic) *Council of Adult Education Act 1981* s 5(1); (Vic) *Adult, Community and Further Education Act 1991* s 6(1) (functions of Board), ss 14–18 (reporting requirements for annual report, accounts and records and audits), s 35 (functions of Regional Councils).

79 (NSW) *Board of Adult and Community Education Act 1990* s 7(2) (Board subject to Ministerial control), s 7(3) (Board must consult with TAFE Commission), s 10 (power to establish committees); (SA) *Vocational Education, Training and Employment Act 1994* s 18(2) (Council may establish committees and delegate functions), s 18(3) (requirements for instruments of delegation), s 18(4) (obligation to consult with community organisations, local government and other relevant bodies); (Vic) *Council of Adult Education Act 1981* s 5(2) (powers including *inter alia* powers to organize and conduct lectures, classes, courses and vacation schools, enter contracts, charge fees, develop materials and deal with real property), s 12 (powers to establish committees), s 13 (power of delegation), s 16 (Council may enter into agreements with ACFE Board and other providers), s 17 (financial powers), s 18 (borrowing powers), s 19 (audit and accounting requirements), s 20 (provision for the vesting of gifts, legacies and bequests); (Vic) *Adult, Community and Further Education Act 1991* s 7 (general and specific powers, including in s 7(2) *inter alia* the powers to form companies and enter into joint ventures, to hold intellectual property rights, and to assign and grant licenses in relation to those rights), subsss 8(a)–(c) (obligation to consult with other bodies such as Regional Councils, the Council of Adult Education, the councils of TAFE colleges, and other bodies providing or using adult, community and further education), s 8(d) (Board must ensure that its actions are consistent with the arrangements for the provision of vocational education and training), s 9 (Board's financial powers), ss 27–31 (powers of delegation), s 35(2) (obligation on Regional Councils to consult with other providers of ACFE in the region), s 36 (powers of Regional Councils).

80 (Vic) *Adult, Community and Further Education Act 1991* s 10 (Minister may issue guidelines or directions), s 11 (Board may enter performance agreements with Regional Councils), s 12 (Board must jointly with the State Training Board prepare an

adult, community and further education plan, revised annually and remade after three years), s 13 (both bodies must implement this plan).

81 (NSW) *Board of Adult and Community Education Act 1990* s 9 (staff to be employed under the *Public Sector Management Act 1988*); (Vic) *Adult, Community and Further Education Act 1991* s 25 (staff may be appointed subject to the public service legislation), s 26 (external staff from other sectors of the public service may be used).

82 (NSW) *Board of Adult and Community Education Act 1990* s 12; (SA) *Vocational Education, Employment and Training Act 1994* s 47; (Vic) Council of Adult Education Act 1981 s 21; (Vic) Adult, Community and Further Education Act 1991 s 21.

83 See above, Chapter Four, A survey of policy relating to vocational education and training, 1992–1998, pp.118–119.

84 (NT) *Northern Territory Employment and Training Authority Act 1991* ss 55–62.

85 *Ibid.*, ss 19(1) and ss 20–23, 85–88.

86 (ACT) *Vocational Education and Training Act 1995* ss 12–24.

87 (NSW) *Vocational Education and Training Accreditation Act 1990* ss 5–26. See also *New South Wales Vocational Education and Training Accreditation Board (VETAB) Accreditation and Registration Manual*, (NSW, VETAB, 1995), *passim*.

88 (Qld) *Vocational Education, Training and Employment Act 1991* ss 19–20.

89 (SA) *Vocational Education, Employment and Training Act 1994* ss 12–15 and ss 20–29.

90 (Tas) *Vocational Education and Training Act 1994* ss 17–19, 25–32, and Schedule 2.

91 (WA) *Vocational Education and Training Act 1996* ss 25–34.

92 (ACT) *Vocational Education and Training Act 1995* s 16 (procedures for application for accreditation of a course), s 17 (criteria for determination by the Accreditation and Training Council), s18 (procedures for application for registration), s 19 (criteria for determination on registration), s 20 (cancellation of registration procedures), s 21 (cancellation of registration at provider's request).

93 (NT) *Northern Territory Employment and Training Authority Act 1991* s 57 (procedures for application for registration), s 58 (criteria to be taken into account and procedures to be followed by Authority in determining applications), s 59 (Authority empowered to issue guidelines), s 60 (duration of registration to be not longer than 3 years), s 61 (Authority's powers to suspend or cancel registration).

94 (NSW) *Vocational Education and Training Accreditation Act 1990* s 10 (Vocational Training and Accreditation Board may issue guidelines), s 11 (Board's power to issue authority), s 12 (procedures for application for accreditation, Board's right to impose conditions, matters to be taken into account by the Board), s 13 (circumstances in which accreditation may be withdrawn), ss 15–17 (accreditation by authorised accrediting bodies).

95 (Qld) *Vocational Education, Training and Employment Act 1991* s 61 (procedures for Vocational Education, Training and Employment Commission to recognise vocational education and training establishments as approved training organisations), s 62 (procedures for renewal of certificate), s 63 (notification of a refusal of application), s 64 (unrecognised establishment not to be continued after 60 days of publication of a notification under s 61(1)), s 65 (cancellation or suspension of recognition), s 66 (offence to advertise falsely in relation to a vocational education and training establishment or program), s 67 (conditions applying to conferral of awards).

96 (SA) *Vocational Education, Employment and Training Act 1994* s 20 (Accreditation and registration by the Accreditation and Registration Council), s 21 (conditions to which accreditation or registration may be subject), s 22 (criteria which the ARC must apply in determining applications for registration and accreditation), s 23 (maximum

duration to be five years with further renewal for five year periods), s 24 (procedures for applications), s 25 (ARC power to review accreditation or registration), s 26 (revocation or suspension of accreditation or registration), s 27 (appeal to Administrative Appeals Court), s 29 (offences in relation to degrees or courses).

97 (Tas) *Vocational Education and Training Act 1990* s 25 (procedures for registration of providers by the Accreditation and Recognition Committee, factors to be taken into account, notification requirements), s 26 (issue of certificate of registration), s 27 (registered training providers may provide, assess and issue approved award), s 28 (circumstances of and procedures for revocation of registration), s 29 (procedures for applications for accreditation of courses, factors to be taken into account, notification requirements), s 30 (issue of certificate of accreditation), s 31 (circumstances of and procedures for revocation of accreditation), s 32 (Accreditation and Recognition Committee to approve awards for accredited courses).

98 (Vic) *Vocational Education and Training Act 1990* s 73A (criteria for accreditation of courses), s 74 (Board's power to investigate courses), s 80 (offences by unregistered persons in relation to the misuse of the title 'registered provider'), s 81 (criteria governing the registration of training organisations, and for appeal against a decision), s 82 (offences and statutory penalties for falsely claiming registration or the recognition of a qualification), s 84 (State Training Board to maintain a register of providers registered under s 81).

99 (WA) *Vocational Education and Training Act 1996* s 27(1)(a) (Training Accreditation Council to register and de-register training providers), s 27(1)(b) (Council to accredit, vary and cancel accreditation of courses and skills training programs and the qualifications gained from such courses and programs), s 27(2) (procedures for applications for registration and accreditation), s 27(3) (when decisions take effect), s 28 (Council's power of delegation), ss 31-34 (procedures for appeals against decisions of Council).

100 (NT) *Northern Territory Employment and Training Authority Act 1991* ss 18, 19(2)–(4), 20–33 and 85–88.

101 (Qld) *Vocational Education, Training and Employment Act 1991* ss 17–18.

102 *Ibid.*, s 21.

103 (Tas) *Vocational Education and Training Act 1994* s 20.

104 (Vic) *Vocational Education and Training Act 1990* ss 42–45

105 See CCH *Australian Labour Law Reporter*, ¶52–050 at p.38 033.

106 See above, Chapter Two, Historical overview, pp.24–28, 36–39.

107 See CCH *Australian Labour Law Reporter*, ¶52–052 at p.38 034.

108 See above, Chapter Four, A survey of policy relating to vocational education and training, 1992–1998, pp.120–121.

109 The bankruptcy power enabled the Commonwealth to pass the *Bankruptcy Act 1966*, s 116 of which deals with the termination of apprenticeship in particular cases. See CCH *Australian Labour Law Reporter*, ¶52–155 at p.38 232.

110 The Commonwealth Employment Service was originally established under the corporations power to meet Australian obligations under an ILO Convention.. See CCH *Australian Labour Law Reporter, loc. cit.*

111 See above, Chapter Two, Historical overview, pp.28–30, and Chapter 5 Section 8, Legislation supporting access and equity, pp.188–189.

112 The Commonwealth external affairs power can be used to incorporate international conventions into Australian law and these can be relevant to the provision of vocational education and training. See, for example, the Commonwealth and State

and Territory anti-discrimination legislation, which gives effect to the ILO Convention on Discrimination (Employment and Occupation) 1958, which includes access to vocational training, as well as to the United Nations Convention on the Elimination of all Forms of Racial Discrimination 1963, and the United Nations Convention on the Elimination of all Forms of Discrimination against Women, which proscribe discrimination in education; the Commonwealth *Workplace Relations Act 1996*, Schedule 16, which incorporates the Preamble and Articles 1 to 6 of the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; the ILO Convention on Human Resources Development 1975, ratified by Australia in 1985, and given effect to federal legislation including the *Employment, Education and Training Act 1988* and the *States Grants (Technical and Further Education) Act 1989*, as well as the education legislation, including that relating to vocational education and training, in the Australian Capital Territory, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the Northern Territory; and the ILO Convention on Vocational Rehabilitation and Employment (Disabled Persons) 1983, which *inter alia* is 'aimed at ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled persons in the open labour market', was ratified by Australia on 7 August, 1990, and has been given effect to by the anti-discrimination legislation in the federal jurisdiction, and in New South Wales, Victoria, Queensland, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory, and by industrial relations legislation and other legislation in the federal jurisdiction, New South Wales, Victoria, Queensland, and South Australia. See *Status of ILO Conventions in Australia—1994*, Department of Industrial Relations, Canberra, 1994, pp.244–245, 308–310, 344–345; see also Lundberg, D 1994, 'Where are we? Reviewing the Training Reform Agenda', NCVER, Adelaide, discussed in Chapter Three, Literature survey, p.67.

113 Commonwealth public sector legislation includes provisions relating to the employment of apprentices. See CCH *Australian Labour Law Reporter*, ¶52–155 at p.38,232.

114 At the time of writing the Act is currently under review because of the requirements of national competition policy. See advertisement for submissions to this review, *The Weekend Australian*, 17–18 January, 1998.

115 See *AMWU v Metal Trades Industry Association of Australia & Ors* (1990) 33 IR 335; 1990 AILR ¶292 in which the Commission held that it had jurisdiction in relation to the establishment of a training board under an award.



116 Department of Workplace Relations and Small Business, Canberra, 'Workplace Relations Act - User Guides: Wage Arrangements for Apprentices and Trainees', nd, np.

117 *Ibid.*, n p.

118 1994 AILR ¶393 (16).

119 CCH *Australian Labour Law Reporter*, ¶52–070 at p.38,101.

120 *Loc. cit.*

121 Department of Workplace Relations and Small Business, Canberra, 'Workplace Relations Act—User Guides: Wage arrangements for apprentices and trainees', nd, np.

122 CCH *Australian Labour Law Reporter*, ¶52–165 at p.38,233.

123 *Loc. cit.*

124 (1980) AILR 248. However a different result was reached in *Re MTIA*, (the *Mack Truck* case) (1991) 3 CAR 373; (1990) 36 IR 451.

125 (1971) 18 FLR 374.

126 (1985) 9 FCR 241.

127 See further the discussion of s 96 of the *Workplace Relations Act 1996*, in Butterworths Federal Industrial Law Service, Sydney, Butterworths, 1996, p.2523.

128 CCH *Australian Labour Law Reporter*, ¶52–165 at p.38,233.

129 See above, Chapter Four, A survey of policy relating to vocational education and training, 1992–1998, pp.120–121.

130 See above, Chapter Two, Historical overview, pp.24–28, 36–39.

131 It should be noted that a draft consultation bill to amend the current legislation has been circulated in Queensland and a draft amending bill is being prepared in Tasmania. Neither of these has become law at 1 March, 1998.

132 (ACT) *Vocational Education and Training Act 1994* ss 25–28 (determination of approved training and prescribed vocations, Authority to be the approving body, prescribed vocations to be published in the *Gazette*), ss 29–32 (employer not to train employee except under approved agreement, procedures for seeking approval, requirements for Authority to approve agreements, Authority to issue qualifications, payment of allowances to trainees required to undertake training outside the Territory), s 33 (Authority to determine the terms of agreements), s 34 (standard terms).

133 (NT) *Northern Territory Employment and Training Authority Act 1991* ss 30–34 (approval to be in writing, provision for pre-vocational training, for credit for existing competencies, procedures for varying programs, Authority to issue of certificates of completion).

134 *Ibid.* ss 35–36 (Chief Executive Officer's powers in relation to approval, variation or revocation of training facilities), ss 41–46 (chief executive officer's powers in relation to approval of training contracts).

135 (NSW) *Industrial and Commercial Training Act 1989* ss 13–15.

136 *Ibid.* ss16–18 (establishment, functions and procedures), ss 65–80 (functions in relation to disciplinary matters), s 98 (protection against liability for members of the Board), and Schedules 3 and 4 (members and procedures).

137 (SA) *Vocational Education, Employment and Training Act 1994* s 30(4) (ARC must approve the form and conditions of a contract of training), s 34 (ARC must approve of the place of employment, the equipment and methods to be used in the training and the persons who are to supervise the training and the ratio of supervisors and trainees), s 42 (records).



138 *Ibid.* ss 39–40 (establishment and procedures).

139 (Tas) *Vocational Education and Training Act 1994* s 14(1) (establishment of Training Agreements Committee), s 14(2) (membership), s 15 (functions and powers), s 16 (power of delegation).

140 *Ibid.* s 33.

141 See for example: *Industrial and Commercial Training (Declared Trades) Order 1997*, 12 May, 1997.

142 See for example: Vocational Training Guideline, Industrial and Commercial Training Council of New South Wales, 22 December, 1993.

143 (ACT) *Vocational Education and Training Act 1994* s 26 (determination of approved training and prescribed vocations by Authority), s 27 (publication in *Gazette*).

144 (NT) *Northern Territory Employment and Training Authority Act 1991* s 26 (declared vocations).

145 (SA) *Vocational Education, Employment and Training Act 1994* s 3(2) (Minister, on recommendation of ARC, may declare an occupation to be a trade or declared vocation, and may vary or revoke such declaration).

146 (Tas) *Vocational Education and Training Act 1994* s 33 (Minister may declare vocations for training agreements), s 36 (Training Agreements Committee to approve training agreements).

147 (NSW) *Industrial and Commercial Training Act 1989* Part 3, Division 2, ss 24–43 (apprenticeships), Part 3, Division 3, ss 44–61 (traineeships).

148 (ACT) *Vocational Education and Training Act 1994* ss 33–37; (NT) *Northern Territory Employment and Training Authority Act 1991* ss 29, 37–54; (SA) *Vocational Education, Employment and Training Act 1994* ss 30–38; (Tas) *Vocational Education and Training Act 1994* ss 33–44.

149 (ACT) *Vocational Education and Training Act 1995* s 29; (NSW) *Industrial and Commercial Training Act 1989* s 64; (SA) *Vocational Education, Employment and Training Act 1994* ss 30(1) and (3); (Tas) *Vocational Education and Training Act 1994* s 34(1).

150 (NT) *Northern Territory Employment and Training Authority Act 1991* s 37(1).

151 (ACT) *Vocational Education and Training Act 1994* s 33 (Authority to determine terms of agreements), s 34 (standard terms).

152 (NT) *Northern Territory Employment and Training Authority Act 1991* ss 28(1)–(3) (chief executive officer may determine conditions of contract of training, and where the terms and conditions of employment are not part of an award under the Commonwealth industrial relations legislation, then chief executive officer may determine them, after consultation with the Northern Territory Employment and Training Authority), s 37(3) (chief executive officer may impose conditions on employer in relation to employment of trainee or probationer).

153 (SA) *Vocational Education, Employment and Training Act 1994* s 30(4) (contract of training must be in the form and contain the conditions required by the Accreditation and Recognition Council), s 30(6) (two or more employers may with the approval of the ARC enter into a contract of training with the same trainee).

154 (Tas) *Vocational Education and Training Act 1994* s 35(1) (content of agreement), s 35(2) (approval of Training Agreements Committee required).

155 (ACT) *Vocational Education and Training Act 1994* ss 35–37; (NT) *Northern Territory Employment and Training Authority Act 1991* ss 47–51; (NSW) *Industrial and Commercial Training Act 1989* ss 38–41 (for apprenticeships), ss 57–60 (for traineeships); (SA) *Vocational Education, Employment and Training Act 1994* ss 31–33; (Tas) *Vocational Education and Training Act 1994* ss 40–42.



156 (ACT) *Vocational Education and Training Act 1994* ss 34(1)(a)–(g) (employer's obligations), ss 34(2)(a)-(c) (trainee's obligations); (NT) *Northern Territory Employment and Training Authority Act 1991* ss 53–54 (employer's obligations not to hinder a trainee in complying with approved training program and to maintain the necessary records); (NSW) *Industrial and Commercial Training Act 1989* s 35 (contract binding), s 36(1) (obligations of employer), s 36(2) (obligations of apprentice), s 37 (recognition of time spent at required courses of study as part of apprenticeship), s 53 (traineeships binding), s 54 (duties of employer and of trainee), s 55 (time at courses of study forms part of time of traineeship); (SA) *Vocational Education, Employment and Training Act 1994* s 37 (contract of training must provide for employment of the persons, but with ARC approval this can be part-time employment), s 38 (requirement to attend courses and obligation on employer to permit this); (Tas) *Vocational Education and Training Act 1994* s 38 (parties must comply with training agreement), s 43 (trainee must attend

classes and courses); (Tas) *Vocational Education and Training Regulations 1995* (fees, travel and meal allowances for trainees).

157 (ACT) *Vocational Education and Training Act 1994* s 31 (Authority to issue qualifications; (NT) *Northern Territory Employment and Training Authority Act 1991* s 52 (Secretary to make declaration as to completion of the contract of training when parties consider that the trainee is qualified); (NSW) *Industrial and Commercial Training Act 1989* s 43 (Commissioner to issue certificates upon the successful completion of the apprenticeship and the required course of studies); (SA) *Vocational Education, Employment and Training Act 1994* s 14(1)(f) (ARC to grant, or arrange for or approve the granting of certificates to persons completing education and training courses); (Tas) *Vocational Education and Training Act 1994* s 44 (Training Authority may issue awards approved by Accreditation and Recognition Committee for successful completion of training course).

158 (ACT) *Vocational Education and Training Act 1994* ss 59–61; (NT) *Northern Territory Employment and Training Authority Act 1991* ss 81–84; (NSW) *Industrial and Commercial Training Act 1989* ss 19–20, 89–91, 94; (SA) *Vocational Education, Employment and Training Act 1994* ss 43–44; (Tas) *Vocational Education and Training Act 1994* ss 67–70.

159 (ACT) *Vocational Education and Training Act 1994* s 39 (disputes to be determined by a committee established by the Vocational Education and Training Authority), s 63 (certain decisions of Authority relating to training agreements can be reviewed by the Administrative Appeals Tribunal established under the (ACT) *Administrative Appeals Tribunal Act 1989*), s 64 (some temporal limitations in seeking review of certain decisions).

160 (NT) *Northern Territory Employment and Training Authority Act 1991* s 63 (grounds for review), s 64 (chief executive officer's power to suspend contract of training), ss 65–67 (establishment, membership of Review Boards), ss 68–70 (Review Board procedures), s 71 (conduct of inquiries), s 72 (Review Board President's power to summon witnesses), s 73 (powers of Review Board in making determinations), ss 74–77 (enforcement of Review Board's orders), s 78 (protection of parties unless false evidence given), s 79 (offences), s 80 (appeal to the Northern Territory Supreme Court only on the ground of error of law).

161 (NSW) *Industrial and Commercial Training Act 1989* s 65 (grounds for complaints), ss 66-69 (complaints to Commissioner for Vocational Training to be referred to the Vocational Training Board), s 70 (procedure generally), s 71 (legal representation only with consent of Board and parties), ss 72–77 (procedures for hearings in relating to witnesses), s 78 (each party to bear his or her own costs), s 79 (conciliation must be attempted before determination is made), s 80 (powers of Board in making determinations), s 85 (constitution of Appeal Panel), s 86 (decisions which may be reviewed by the Appeal Panel), s 87 (procedures for Appeal Panel), s 88 (determinations of Appeal Panel, enforcement, further appeal to the Industrial Relations Commission by leave of that Commission, and decision of Commission is to be final).



162 (SA) *Vocational Education, Employment and Training Act 1994* s 39 (establishment of the Disputes Resolution Committee as a committee of the Accreditation and Recognition Council), s 40 (procedures for determination of disputes including subs 40(3)(a)–(k) powers which may be exercised in resolving the dispute).

163 (Tas) *Vocational Education and Training Act 1994* s 67(1)(b) (inquiry into any decision of the Training Agreements Committee in relation to training agreements), s 68 (disputes relating to training and vocational placements agreements to be heard and determined by the Training Agreements Committee).



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164 (NSW) *Industrial and Commercial Training Act 1989* ss 65–69.

165 *Ibid.* s 65.

166 The Queensland Draft Vocational Education and Training Bill 1997 similarly refers to 'training contracts'.

167 (Qld) *Vocational Education, Training and Employment Act 1991* s 6 (constitution of Commission), s 7 (membership), s 8 (Commission subject to direction of the Minister), ss 9–10 (functions), s 11 (powers), s 119 (obligation of confidentiality), s 125 (indemnity).

168 *Ibid.*, ss 68(1)–(6) (Council must approve elements of training scheme), ss (68(7)–(8) (approval of employer applications), s 68(9) (Council may approve a trade to be an apprenticeship calling), s 68(10) (apprenticeship provisions in the Act to apply to all apprenticeship callings), s 68(11) (approvals must be notified in Industrial Gazette).

169 (Vic) *Vocational Education and Training Act 1990* s 51(1) (Board's power of determination), s 51(2)(a)–(h) (matters which may be included in the determination).

170 (Qld) *Vocational Education, Training and Employment Act 1991* s 68(1) (approval of training schemes), s 68(9) (approval of trade to be an apprenticeship calling), s 68(11) (requirement of notification of approval in Industrial Gazette), s 70(5) (Council must approve application for agreement), s 70(7) (training agreement binding on trainee and employer, and trainee's guardian while the trainee is a minor), s 73 (period of training scheme);s 75 (trainee's and apprentice's attendance at courses of instruction), s 92 (employer to maintain record), s 93 (training record issued by State Council to be maintained by trainee and employer), s 95 (employer must not obstruct apprentice's or trainee's attendance at college or class); (Qld) *Vocational Education, Training and Employment Regulations 1991* regs 29–37 provided *inter alia* for in reg 29 (indentures of apprenticeship), reg 30 (training agreements) and reg 31 (employer records), reg 32 (status of tradesperson in apprenticeship callings), reg 33 (ratio of apprentices to tradespersons generally), reg 34 (restriction on number of apprentices in certain callings), reg 35 (State Training Council may permit increase in number of apprentices), reg 36 (restrictions on use of electrical apprentice or electrical trainee), reg 37 (restriction on use of apprentice or trainee in certain activities); (Vic) *Vocational Education and Training Act 1990* s 53(1) (requirement for approval ), s 53(2) (matters to be taken into account), s 53(3) (conditions may be imposed), s 53(4) (Board's power of revocation if conditions are breached), s 54(1) (employer obliged to ensure apprentice is trained in accordance with an approved training scheme), s 54(2) (attendance at a vocational education and training course during normal working hours deemed to be attendance at work), s 55 (apprentice obliged to comply with training scheme), s 57 (Board may determine the term of training agreements).

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171 (Qld) *Vocational Education, Training and Employment Act 1991* ss 68–76 do not distinguish between apprentices and trainees, but see s 77 (minimum qualifications for apprenticeships), s 78 (restrictions on employing persons under 21 in an apprenticeship calling), s 79 (employer's entitlement to apprentice) and s 80 (apprentice must be paid for course time) which seem to refer only to apprentices.

172 (Qld) *Vocational Education, Training and Employment Act 1991* s 74 (temporary assignment of trainee), s 91 (temporary inability of employer to provide work), s 97 (cancellation of indenture or training agreement on request); (Vic) *Vocational Education and Training Act 1990* s 58 (parties may cancel, suspend or vary by mutual consent, or the Board may cancel or suspend if special circumstances make such action desirable), s 59(1) (reduced wages if reduced employment), s 59(2) (application to Board if employer is in financial difficulties), s 59(3) (Board must ascertain that circumstances warrant the making of such an order), s 59(4) (employer may stand down an apprentice if not usefully employed because of a strike, breakdown of machinery or

stoppage of work for which employer is not responsible), s 62 (assignment of training agreements).

173 (Qld) *Vocational Education, Training and Employment Act 1991* s 111 (power of entry onto premises), s 112 (monitoring warrant), s 113 (offence related warrant), s 114 (exercise of powers and seizure), s 115 ( duty to protect interest of employees to whom Act applies), s 116 (offences of obstruction and failing to answer questions), ss 117–118 (proceedings for offences), s 123 (evidentiary provisions); (Vic) *Vocational Education and Training Act 1990* s 91B (appointment of authorised officers), s 91C (identification of authorised persons), s 91D (powers to enter premises and penalty for obstruction), ss 92, 92A (procedures if there is an offence against this Act), s 93 (admissibility of evidence).

174 (Qld) Vocational Education, Training and Employment Act 1991 s 96 (State Training Council may deal with misconduct by apprentice or trainee), s 98 (Industrial Magistrate may deal with an employer who failed to provide apprentice or trainee with tools of trade), ss 100–104 (Industrial Magistrate may deal with recovery of moneys due to apprentice or trainee in certain circumstances), s 117 (State Training Council to deal with disputes relating to apprenticeship or training agreement), s 124 (appeal to Commission or Minister or Industrial Magistrate); (Vic) Vocational Education and Training Act 1990 s 60 (State Training Board to determine grievances in certain circumstances, and powers to be exercised).

175 (WA) *Vocational Education and Training Act 1996* s 62, Schedule 2, cl 2(3), with reference to the repeal of the *Industrial Training Act 1975*, repealed by s 61, provides that 'Any regulations made under the repealed Act and in operation immediately before the commencement of section 61 which were applicable to, or in respect of, an apprenticeship or industrial training agreement referred to in subclause (2) are to continue to apply to such an agreement, until regulations are made under this Act in respect of the matters covered by those regulations.'

176 See *Workplace reform information sheet*, (Queensland, Department of Training and Industrial Relations, 1997), no.11, pp.1–2, and *Queensland Workplace Reform*, (Queensland, Department of Training and Industrial Relations, 1997), p.13. It should be noted that the existing provisions of the (Qld) *Workplace Relations Act 1997* relating to apprentices and trainees are likely to be amended under the Vocational Education and Training Bill 1998. See *Consultation Draft: Vocational Education and Training Bill 1997 and TAFE Institutes Bill 1997*, (Queensland, Department of Training and Industrial Relations, 1997), pp.126–136 for details of these proposed amendments.

177 (SA) *Industrial and Employee Relations Act 1994* s 4(1) (definition of apprentice and of industrial matters).

178 (Tas) *Industrial Relations Act 1984* s 42(a) provides that an award made under this Act is subject to the *Apprentices Act 1942* although the Act does not specifically refer to apprentices in its definition of industrial matters in s 3.

179 (Qld) *Vocational Education, Training and Employment Act 1991* s 83 (fixing of wages payable to trainees), s 84 (superannuation entitlements due to trainees) s 85 (trainees entitlements if not under training agreement), s 86 (fixing of wages payable to apprentices), s 87 (fixing of other entitlements of apprentices), s 88 (apprentices' entitlements if not under training agreement), s 89 (Industrial Commission may order provision of tools of trade for apprentices). It should be noted that the Vocational Education and Training Bill 1997 cls 34–63 is likely to replace this legislation in the near future.

180 See, for example, *Victorian Government Gazette*, 8 January, 1998, pp.35–36, and 29 January, 1998, pp.244–256.

181 (Qld) *Vocational Education and Training (Industry Placement) Act 1992* ss 4 (college includes both government and non-government secondary schools, special schools, State colleges within the meaning of the *Vocational Education, Training and Employment Act 1991*, rural training schools within the meaning of the *Agricultural Colleges Act 1994*, approved training organisations under the *Vocational Education, Training and Employment Act 1991*, and any other body prescribed by regulation).

182 *Ibid.* s 21 (Council's power of delegation), s 22 (regulations).

183 Victoria, Department of Treasury and Finance 1997, *A guide to implementing competitively neutral pricing principles/Government of Victoria*, Victorian Government, Melbourne, p.1.

184 *Loc. cit.*

185 Selby-Smith, C & Selby-Smith, J 1997, 'Third party access and separation of roles in the implementation of user choice', paper presented at the National Centre for Vocational Education Research Conference, Melbourne, July, 1997, p.1; see also Best, R 1994, 'Vocational education and training: In a league of its own?', in Stewart, D (ed.), *Proceedings of the 3rd Annual Conference of the Australian and New Zealand Education Law Association*, ANZELA Inc, Brisbane, pp.51-62, (discussed above in Chapter Three, Literature survey, p.66), for a critique of the application of the legislative matrix of competition law to the activities of VET providers.

186 *Loc. cit.*

187 See *Consultation draft: Vocational Education and Training Bill 1997 and TAFE Institutes Bill 1997*, Department of Training and Industrial Relations, Queensland, 1997, TAFE Institutes Bill 1997 ss 6–20 for details of these amendments.

188 See above Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.112–117, for an account of these policies.

189 (Cwth) *Racial Discrimination Act 1975*; (Cwth) *Sex Discrimination Act 1984*; (Cwth) *Human Rights and Equal Opportunity Commission Act 1986*; (Cwth) *Disability Discrimination Act 1992*; (ACT) *Discrimination Act 1991*; (NT) *Anti-Discrimination Act 1992*; (NSW) *Anti-Discrimination Act 1977*; (Qld) *Anti-Discrimination Act 1991*; (SA) *Equal Opportunity Act 1984*; (Tas) *Sex Discrimination Act 1994*; (Vic) *Equal Opportunity Act 1994*; and (WA) *Equal Opportunity Act 1984*.

190 (Vic) *Equal Opportunity Act 1995* s 4.

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191 At the time of writing, information about the new arrangements has been only through media reports of the announcement of the scheme: see, for example, Grattan, M, 'CES successor to compete with private sector firms', *The Australian Financial Review*, 20 February, 1998; Grattan, M, 'Ads to focus on Govt efforts to help jobless', 24 February, 1998, Grattan, M, 'Private Sector wins third of contracts to place jobless', *The Australian Financial Review*, 27 February, 1998; Grattan, M and Lawson, M, 'Privatising the Unemployed', *The Australian Financial Review*, 27 February, 1998; Mitchell, B, 'Privatised job system a threat to small agencies', *The Age*, 23 February, 1998; Mitchell, B, 'Jobs by another name', *The Age*, 7 March, 1998; 'Marketing job search', Editorial, *The Australian Financial Review*, 24 March, 1998

192 The Social Security Legislation Amendment (Youth Allowance) Bill 1997 cl 2 provides that the amendments will commence on 1 July 1998, unless the *Student and Youth Assistance Act 1973* has not been repealed by that date, in which case it will commence on the day after the repeal takes effect. See House of Representatives, *Social Security Legislation Amendment (Youth Allowance) Bill 1997: Explanatory Memorandum*, p.3.

193 *Ibid.*, p.2.

194 *Ibid.*, pp.4–86. Items 1–5 of the Bill make certain changes to definitions in s 23(1) the *Social Security Act 1991*. Item 6 inserts a new Part 2.11 in the *Student and Youth Assistance Act 1973*.

195 *Ibid.*, pp.2–3.

196 (Cwth) *Indigenous Education (Supplementary Assistance) Act 1989* s 4 (object of Act—increasing involvement of Indigenous people in educational decisions), s 5 (object of Act—equal access to education by Indigenous people), s 6 (object of Act—equity of participation by indigenous people in education), s 7 (object of Act—equitable and appropriate educational outcomes for indigenous people), s 7A (object of Act—to develop culturally appropriate education services for indigenous people).

197 See *Status of ILO Conventions in Australia—1994*. Department of Industrial Relations, Canberra, 1994, pp.244–245, 308–310, and 344–345.

198 See also, Lundberg, D 1994, 'Where are we: Reviewing the Training Reform Agenda', NCVER, Adelaide. His suggestion that the UNESCO Convention on Technical and Vocational Education could provide the basis for Commonwealth legislation to implement a national training scheme is discussed in Chapter Three, Literature survey, p.66.

# VET law and policy: An examination

## 1 Introduction

THUS FAR IN this survey of the policy and law relating to VET a number of tasks have been completed. The historical background to the contemporary framework of the legal regulation of VET has been examined. A review of the literature has been presented. The key current policies relating to VET, especially the development of a National Training Policy, the elements of the New Apprenticeship Scheme (NAS), the application of competition policy to the VET sector and policies relating to access and equity have been described. A survey of the legal regulation of VET has been undertaken, with particular and detailed reference to the core legislation relating to the provision of VET and to the implementation of the key current policies. Before moving to a synoptic examination of the relationship between the law relating to VET and the policy relating to VET a number of preliminary observations must be made.



It is evident that there has been little previous written discourse on the legal regulation of VET. This has meant that VET law has not been discussed widely as an incident of labour law and industrial relations law, and consequently an examination of its content according to concepts of legal organisation and method has not been undertaken. Further, there has been no weighing up of its benefits and of its defects. Because the fields of labour law and industrial law have not been concerned with the law relating to VET there has been no consideration of the implementation of this law insofar as it affects employers, employees and trade unions in industrial settings such as conciliation and arbitration, collective bargaining and direct statutory regulation. In the newly evolving field of education law, attention has been chiefly focussed on the diverse legal incidents of the provision of VET rather than on the legal framework of VET. Consequently although education law has improved the recognition of the law relating to VET it has not to date filled the gap in the field arising from the link with labour market and employment concerns.

This study, however, has opened more fully the field of VET to legal examination. Given that in the Australian federal system there is law from nine jurisdictions, that is from the Commonwealth, the six States and the two Territories, it has been necessary both to catalogue the law and to describe it. An examination of the constitutional context of the law relating to VET was the starting point for this task.

In accordance with the first specific objective of the research the existing body of law in all the Australian jurisdictions has been collected and classified according to its aims and purposes. This classification of the law recognizes three *major* purposes of the law relating to VET: firstly, that it provides the statutory framework for the development of National Training Policy by the Commonwealth and the States and Territories; secondly, that it provides for the regulation of public providers of TAFE and for other statutory bodies for accreditation and registration of providers and for statutory advisory bodies; and thirdly, that it regulates apprentices and trainees. Other objectives such as the regulation of vocational placements, the application of competition policy, and the legislation supporting access and equity have also been described. It may also be noted that insofar as the law relating to VET has a role in supporting labour market training this is currently concerned with the regulation of apprenticeships and traineeships. Contemporary government policy in recent times has moved away from emphasis on labour market programs which involved a significant training component, although some training may still be part of a program for individual persons participating in labour market programs designed to assist with entry to the labour market.[1]

In accordance with the second specific objective, namely to describe and examine the most important aspects of VET policy, the key contemporary policies have also been described and explained in detail.[2]



The survey of the law and the survey of the policy provided the body of information for the examination of the link between the policy and the legislation, which was the third specific objective of the research. Three hypotheses concerning law and policy in VET were explored:

- that the law and policy on VET have not evolved in a systematic manner
- that the law and policy on VET do not provide a rational, coherent or internally consistent program for VET in Australia
- that the law and policy on VET do not provide adequate guidance for people working in VET

The exploration of these hypotheses was assisted by examining law and policy according to four conceptual criteria: transparency, completeness, coherence and consistency, which gave rise to the fourth specific objective, namely that of evaluating the law according to these criteria.[3] It is to the examination of the link between law and policy that we now turn.

## 2 The link between law and policy

The underlying theme of the development of law and policy relating to VET in Australia during the twentieth century has been the need to develop the national economy. In the final decades of the twentieth century the force of the proposition that the provision of an appropriately skilled labour force has been the task of VET has not diminished. Consequently the regulation of the provision of VET continues to be concerned with concurrent economic and educational objectives. The general objective of contemporary policy in VET is the development of a national vocational education and training system. There are a number of specific policy objectives by which it is sought to achieve the general objective, and these require the legislative co-operation of the States and Territories. One such policy objective is the development of appropriate administrative structures to enable the Commonwealth and the State and Territory governments to work co-operatively in the implementation of specific policies. Is there a problem of possible tension in reconciling the elements of the National Agreement and local intra-jurisdictional interests? Do the federal and State and Territory legal frameworks provide adequately for the resolution of this tension through the exercise of executive powers? Do the State and Territory legal frameworks provide adequately for administrative structures for developing National Training Policy? How binding is the National Agreement? The National Agreement stresses the role to be played by industry. Do the legal frameworks provide adequate structures for an effective industry advisory role to be carried out at both national and State and Territory levels?

The accreditation and registration of training organisations, also a legislative function of the States and Territories, is a fundamental feature of the National Training Framework, which by the use of training packages based on competency standards and providing assessment guidelines, seeks to enable the nationwide mutual recognition to be given to qualifications under the Australian Recognition Framework. Are the State and Territory legal frameworks, insofar as these relate to the accreditation and registration of providers, consonant with the nationally agreed policy? The policy framework itself appears unambiguous and comprehensive in that it covers all major aspects of training provision including funding, accreditation and recognition of awards, whilst providing opportunities for the States and Territories to customise training provision within a regulatory framework with devolved responsibility to the registered training organisations. The issue is how well the legislative frameworks support this policy.



The development of the NAS in all the States and Territories requires that the concept of 'declared vocations' for apprenticeships and traineeships in the legislation of the States and Territories be replaced by the broader and more flexible concept of 'training agreements' or 'training contracts', which do not have an age bar at entry, which are not based on the 'time-served' concept, and which are not limited to full-time employment. The purpose of this policy has

been to develop a nationally consistent entry level training system which provides individuals with access to employment opportunities across a wide range of industries where qualifications and awards are recognised nationally. How well does the State and Territory legislation currently reflect this change? The policy relating to group training is well established. How far is this accommodated or recognised in the regulation of apprenticeships and traineeships in the State and Territory legislation? Traditionally, the regulation of apprenticeships has included provisions for dispute resolution which were intended to protect the rights of the parties, that is the employers and the apprentices. Has this been altered given the flexibility of the NAS?

The NAS also requires that a core element in the past regulation of apprenticeships and traineeship, namely the development of an effective consonance between the regulation of training and relevant industrial relations law be maintained. In the case of the NAS has this consonance been established between the operation of the (Cwth) *Workplace Relations Act 1996* and the awards and agreements made under this Act and the State and Territory training legislation? Are the State and Territory industrial relations laws in those jurisdictions where they are operative consonant with the requirements of the NAS?

A further policy which is clearly concerned with the provision of effective VET is the VET-in-Schools/School-to-Work Transition Policy relating to the provision of opportunities to undertake VET in the senior years of secondary school. The regulation of secondary schooling is a matter for the States and Territories. How far has the regulatory framework of education accommodated this policy issue? Finally, it may be noted that the application of certain general structural policies, namely competition policy and the policy relating to access and equity also affects the nature of the law relating to VET. The application of competition reform policy by State and Territory governments raises the issue of how far requirements as to the purchaser/provider split, third party access, competitive neutrality in tendering and user choice are integrated into the legislation regulating public and private providers of VET. The application of the policy of ensuring access and equity in VET also raises the issue of the extent to which this needs to be reflected in VET law.



What then has our research told us about the relationship between law and policy? In general it may be said that the legislation relating to VET tends to give effect to the major policies. For example, in the legislation, provision is clearly made for collaborative endeavour between the Commonwealth and the States and Territories to develop the National Training Policy. This is clearly evident in the adoption of the concept of the State Training Agency, in the role of ANTA and of the State Training Authorities and in the provision of discretionary executive powers for the relevant Ministers in the several jurisdictions. However, the position is less clear in relation to certain other policies. One example is that of the policy relating to the role of industry. This is clearly a key policy element of

the National Agreement, but an examination of the legislation suggests that the nature of the statutory basis for this role varies considerably. There is, for example, no express statutory provision for ITABs in the federal legislation, or in the legislation in the Australian Capital Territory, the Northern Territory, New South Wales and Western Australia, and there is only a limited acknowledgement of the role of industry in South Australia and Queensland. It may reasonably be suggested nevertheless that the constitution of ANTA and the State Training Authorities will accommodate the role of industry in practice and that this is sufficient. Another example is to be found in the situation, at the time of writing, that the legislation in several jurisdictions has not yet been altered to accommodate the changed emphasis in the National Training Framework from the accreditation of courses to the recognition of registered training organisations. Indeed only the Victorian legislation has been amended in this regard, although change is underway in Queensland and is foreshadowed in Tasmania. Nevertheless, this may be merely a function of time in that in the multi-jurisdictional Australian federal system there is an inevitable delay in the amendment of legislation across the jurisdictions to accommodate new policy developments.

With regard to the NAS, which was introduced on 1 January, 1998, the legislative situation is also presently unclear, although it is far too soon to expect evidence to be available as to the changes which might be expected to have occurred in the provision of training as a result of the implementation of the NAS. Certainly there is evidence of legislative accommodation of the new policy by way of removing the 'declared vocation' requirement as the basis for apprenticeships and traineeships, for example, in the amended Victorian legislation, and in the current development of the Queensland legislation. It is also arguable that the Western Australian legislation does not require any amendment to accommodate this change. However, at the time of writing, there is no indication as to actual changes to be made to the legislation in other jurisdictions. Of course, this may not matter as merely not exercising, or by exercising more broadly, or by varying administratively the exercise of executive power to declare vocations may well suffice in practice to allow the implementation of the new policy. Similarly, at the time of writing, it cannot be said that effective consonance has been achieved across all the jurisdictions between the VET legislation which regulates apprenticeships and traineeships and the relevant industrial relations legislation. Again, this may simply be a function of the time which is necessary to achieve the implementation of the legislative program in the various jurisdictions.



Insofar as legislative changes in the State and Territory VET and education legislation are necessary to accommodate the development of the School to Work Transition policy, particularly in relation to vocational placements, these similarly have not yet been made across all the jurisdictions. However, it is important to note that issues such as accident insurance and indemnity insurance, students'

hours of work and rates of payment, which arise in the School to Work Transition policy can probably be resolved by administrative action, and arrangements which are satisfactory to all parties can be made, and consequently legislative change may not even be contemplated in a particular jurisdiction. It has been noted that all the States and Territories have passed competition reform legislation, but this has not generally been integrated into the VET legislation. Again, this does not mean that competition policy is not being applied in the VET sector, for this too can be done administratively under the powers provided in the competition policy legislation, and amendment of the VET legislation may not be regarded as being required. As far as the application of policy relating to access and equity is concerned, this is strongly supported by the operation of anti-discrimination legislation in all jurisdictions, and by the national operation of social security legislation, whether or not the particular VET legislation expressly includes reference to it.

What does all this say about legislation as a means of fulfilling policy—as an instrument of policy—in the Australian federal system? Typically, legislation in the federal and State and Territory jurisdictions allows for the exercise of both executive powers and of legislative powers. Executive powers are those powers given usually to the Minister responsible for the administration of the particular Act to issue orders and declarations which determine what may be done. These executive powers may be both mandatory, in the sense that the Minister is obliged to exercise them, or they may be discretionary, that is their exercise is at the discretion of the Minister. In some circumstances, provision may also be made in the legislation for the delegated exercise of these powers by a senior public servant. The exercise of legislative powers provided for in an Act enables the development of subordinate legislation, that is statutory rules or regulations, which require the approval of Parliament according to the procedures within a particular jurisdiction. These executive and legislative powers which the Parliaments have provided for in the VET legislation in the several jurisdictions constitute powerful instruments for the implementation of policy under that legislation. What is of interest is the balance in a particular Act of the executive and legislative powers. It is probably a fair conclusion that much of the VET legislation in the several Australian jurisdictions provides for a fair measure of executive power. The exercise of the executive power does not require the further scrutiny and approval of Parliament, but of the executive arm of government. This provides a fairly direct and expeditious means of implementing policy. The exercise of the legislative powers does require Parliamentary scrutiny and approval, with the consequent possibility that the Parliament may challenge the implementation of a particular policy.



A significant potential source of difficulty for the implementation of policy relating to education in the Australian federal system is the constitutional issue that the power to develop policies for education, including VET, is a power which belongs to the States and Territories. Consequently, the Commonwealth may use

other heads of power, chiefly powers relating to finance, to encourage the implementation of certain policies relating to VET, but cannot implement such policies directly through federal legislation.[4] Certainly the Commonwealth has at its disposal potentially coercive financial powers, but in practice the Commonwealth seeks to use co-operative, collaborative methods at executive Ministerial level to ensure the implementation of the desired policies. This is exemplified in the processes used to develop the National Agreement. Despite a period of considerable ill-feeling in intergovernmental relations after the Commonwealth Government offered to take over funding and policy control of TAFE from the States in 1991, by 1992 a collaborative and co-operative compromise was reached in the ANTA National Agreement.[5] However, the use of co-operative, collaborative methods means that the National Agreement is binding only insofar as it is consonant with the policy goals within a particular State or Territory jurisdiction. Whether or not a particular policy arising from the National Agreement is legislatively implemented in a given jurisdiction depends ultimately upon the government in that jurisdiction. Similarly how a particular policy is to be implemented depends upon a State or Territory government's view of intra-jurisdictional issues, that is how the implementation of a policy will fit the historical, economic, political and demographic context within that jurisdiction. It is very clear from a survey of the legal regulation of VET in the Australian State and Territory jurisdictions that the legislation, traditionally and contemporaneously, is similar but certainly not identical in the administrative and regulatory structures used in the provision of VET within the particular jurisdiction. For example, it may be recalled that the amended Victorian *Vocational Education and Training Act 1990*, the Western Australian *Vocational Education and Training Act 1996*, and the draft Queensland Vocational Education and Training Bill 1997 all accommodate the NAS, but the structure and the provisions of these pieces of legislation and draft legislation are certainly not identical. Of course, what falls to be determined by empirical research, and is not part of this research, is whether these differences in legislative structures for the implementation of VET policy are of any practical significance in determining whether or not a policy can be said to have been effectively implemented over a given period of time. However, the text of the legislation governing VET can be examined *prima facie* with regard to the conceptual criteria of transparency, completeness, coherence and consistency in relation to key policies relating to VET, and it is to this examination that we now turn.



# 3 An examination of the law and policy relating to VET

## 3.1 The transparency of the law and policy

The criterion of transparency requires that the question be asked whether or not legislation and policy in its current form is likely to be comprehensible and

accessible to those required to implement it, and to the public in general as well as to researchers. This is, of course, a question which can reasonably be asked of any body of law, or indeed any policy. As far as the law is concerned there are a number of barriers which can lessen its transparency. The problems of accessing the law, and keeping up with the changes in the law should not be a problem for lawyers, but they may well be for members of the general community. However, these problems should not exist for administrators insofar as the legislative schemes for which they have responsibility for day-to-day administration are concerned. For example, it could be expected that the constitution, powers and functions of the various statutory authorities would be understood by those charged with the responsibility for their operation, and for the operation of a legislative scheme to implement a particular policy in the particular jurisdiction, whether that legislation covers the administration of the NAS, or the administration of public TAFE providers, or the accreditation and registration of providers. Nevertheless, given the number and complexity of statutory instruments regulating vocational education and training, the argument that the total legislative context of their work is clearly accessible to training organisations, to employers and to apprentices and other students in the VET sector is somewhat problematic.

The application of the technical rules of statutory interpretation similarly can in themselves constitute a barrier to members of the community other than lawyers. Other criticisms of the statutory instruments, which have been illustrated by the laws cited in the survey of the legal regulation of VET, include: the complex language and grammatical structures used in the drafting of legislation; the length of individual Acts and the scope of their substantive content; and the relative difficulty of reading principal Acts together with amending legislation, particularly where the latter may be procedural omnibus amending legislation, not necessarily readily identified with a particular body of law, which affects a significant number of legislative enactments. This latter difficulty can be overcome to some extent where governments provide frequent reprints of Acts, but not all legislation is necessarily reprinted. The criticisms of subordinate legislation, that is regulations and statutory rules, are similar, and there may be the added difficulty, which can apply to executive memoranda such as Ministerial orders and declarations, of locating them in the relevant government gazette, where they are not published separately.



There is however a countervailing element which may lessen the impact of these criticisms in practice. The complexity of government in a modern post-industrial democracy such as Australia means inevitably that use will be made of explanatory materials to clarify the operation of law and policy. In relation to the law, there may be administrative guidelines and explanatory information issued by government departments in relation to the operation of particular laws. In relation to the policies, policy statements are also issued by government to the relevant institutions and bodies. There may also be information disseminated

through advertising in the news media and by way of explanatory pamphlets which outline the key elements of policies.

The issue of the transparency of the law and policy in relation to VET was one explored in qualitative interviews. The researchers' understanding was that there were two points of emphasis generally evident in the insights gained: the first was that VET law is complex, and the second was that if there was effective dissemination of relevant matters in relation to the law and to the policies then this complexity was not of great concern. In relation to the law, indicative insights included the following:

> *From a policy development design perspective . . . you need technical terms . . . you need also transducers, which turn . . . jargon and specialised knowledge into something that the end user can understand and [which] satisfies all the protagonists.*
>
> *It probably is [complex] but then there are probably very few people who really need to know for practical purposes, the ins and outs of every aspect . . . That's all the infrastructure, if you like, within the system that goes to producing the product that the employer needs to see, and as long as the product is transparent and easily acceptable . . . then that other stuff doesn't really matter.*
>
> *This is one of the problems, but I hesitate to say that vocational training law is less accessible than any other area of law . . . [it] is no worse or better than a lot of superannuation law, criminal law or any other area of the law that you look at, and by that comparator it generally means expert assistance if somebody wants to get a correct interpretation . . .*
>
> *I'm not sure the law is ever transparent . . . there have been quite dramatic changes in the last five years in particular . . . It takes a while for people to be familiar with a new world and how they are to fit into that.*

In relation to the dissemination of policies particular reference was made to information which was made available through VET sector networks. The range of insights offered the researchers seemed to refer chiefly to the initial phases of introducing new policies:

> *I think that we've been in the business of developing fairly differentiated documents for various State policies . . .*
>
> *Certainly . . . whenever we are invited to talk with a group we will generally do our utmost to do it. So there are formal mechanisms and informal mechanisms by which we try to get the information out.*
>
> *The transparency overall, I don't think it's there . . . The notion itself [of Training Packages] is transparent, yes, but it needs marketing and selling, and that's what ANTA and State Training Authorities are currently grappling with.*
>
> *I get [ANTA's] newsletter faxed through on a regular basis . . .*
>
> *Again, talking about competency-based training . . . by the time that it filters down to the level of employer it has probably been fairly watered down, or they just don't get that information.*
>
> *But when it comes to CBT, competency-based training . . . I've got to know all the terminology and how it works, but the industry at large doesn't understand.*

*The policy itself, if you look at the documentation, in essence, its fairly transparent and it makes some sort of sense . . . However . . . you only have to look at the language that's used and the number of acronyms involved, and talk to somebody who is not familiar with it . . .*

In summary it is seems fair to say that the law and policy relating to VET are complex, but perhaps no more so than other areas of law and policy, and that the need to disseminate clear information is in practice well understood and well acted upon in the VET sector at Commonwealth, State and Territory levels. Nevertheless, this process necessarily takes time.

## 3.2 The completeness, coherence and consistency of VET law and policy in major policy areas

The criterion of completeness requires that the question be asked whether or not there are any gaps and ambiguities in the legislative framework at federal, and/or State and Territory levels. That of coherence requires that the question be asked whether or not the overall body of legislation gives effect to a coherent, rational strategy with respect to the fundamental objectives of government policy relating to VET. That of consistency requires that the question be asked whether or not there is evidence in the overall body of legislation or duplication and imprecision in the administrative structures which are provided for the implementation of VET law and policy. These were issues raised during the qualitative interviews as a global array of concepts. It must be remembered that the qualitative interviews were not a survey of views, but rather were sought to enable the researchers to obtain further perspectives on their own reflections on the subject matter of the research. The insights offered by the interviewees were of great value in the development of this commentary.

### 3.2.1 The formation of national training policy



In the Australian constitutional context it is desirable that both federal legislation and State and Territory legislation be consistent and compatible if a national legislative framework to further the development of a national training policy is to be constructed. Insights obtained from the qualitative interviews reinforced the proposition that there has been a successful move towards the development of such a national legislative framework, but this has not necessarily been an easy task in all respects:

*There is a fairly well developed funding relationship between the Commonwealth and the States . . . through the ANTA arrangements. [There is] also . . . a pretty highly developed collaborative approach to broader policy issues through the Ministerial Council.*

*[One difficulty with obtaining consistency is that] vocational training by its nature depends on both Commonwealth and State legislation . . . [and] . . . a lot of the decisions in the operation of VET don't depend on legislation but on Ministerial regulation and administrative decisions . . . We've achieved some movement towards*

*national consistency in frameworks and that's been good in itself, but whether we should be trying for a bit more than a framework is part of the question.*

*You've got six States, two Territories and the Commonwealth all trying to reach negotiated agreements . . . [and this is an arrangement] . . . that by and large works because there is a reasonable degree of good will amongst the States and Territories and the Commonwealth . . . States and Territories will try . . . and meets the needs of ANTA and the Commonwealth Government.*

If the objects of the Commonwealth, State and Territory legislation and the administrative structures established by that legislation for the development and implementation of the National Training Policy are examined, there is further support for the proposition that the process of developing a consistent and compatible legislative framework throughout the several Australian jurisdictions is well under way but, strictly speaking, cannot be said to be technically complete.

Within the federal jurisdiction, the (Cwth) *Australian National Training Authority Act 1992* and the (Cwth) *Vocational Education and Training Funding Act 1997* do seem to be consistent in their objects and provisions as these relate to the establishment of a National Training policy. As far as the objects of the State and Territory legislation are concerned,[9] there is some inconsistency between the jurisdictions. For example, some legislation in the Northern Territory, and in South Australia, New South Wales and Tasmania does not provide a statement of objects, and there is other legislation in the Australian Capital Territory, New South Wales and Victoria, which is concerned with the regulation of the particular State or Territory training system, and which does not refer expressly to the development of a National Training Policy. However, the (WA) *Vocational Education and Training Act 1996*, the (NSW) *Board of Vocational Education and Training Act 1994* and the (Qld) *Vocational Education, Training and Employment Act 1991* do include references in their objects to meeting those States' obligations under the national arrangements for vocational education and training. In this context it may be noted that s 3 of the Queensland Draft Vocational Education and Training Bill 1997 provided a contemporary restatement of objects of vocational education and training legislation:



*The objectives of this Act are—*

*(a) to establish a State training system for the effective and efficient provision of vocational education and training to meet the immediate and future needs of industry and the community and*

*(b) to provide mechanisms by which employers, employees and the community can advise government on vocational education and training needs and priorities to meet the needs and*

*(c) to encourage the development of training by, and within industry and*

*(d) to encourage people to enter learning and continue learning throughout their lives and*

*(e) to facilitate the provision of vocational education and training that—*

*(i) is relevant to employment or*

*(ii) encourages—*

*(A) the generation of employment opportunities or*

*(B) enterprise development and*

*(f) to regulation the registration of training organisations and contracts of training within the State and*

*(g) to promote the development of a national vocational education and training framework*

These words do reflect the essence of the contemporary National Training Policy: the federal and State and Territory collaboration, the broad provision for VET which includes not only entry-level training but also middle level training, the inclusion of workplace training, and the registration of training organisations as well as concern for the links between the labour market and VET.

To develop a National Training Policy it is necessary to establish administrative structures at both federal and State and Territory levels for the development and implementation of policy. The (Cwth) *Australian National Training Authority Act 1992*[7] provides for the establishment of ANTA, which is, under the direction of the Ministerial Council, to work with State and Territory Training Agencies[8] and develop the National Training Policy. As far as the federal legislation is concerned, its purpose is essentially to establish administrative structures for the development of the broad policy framework and the disbursement of federal funding to the States and Territories to assist with the implementation of that policy. On the other hand, the State and Territory legislative schemes provide for statutory bodies, which not only have powers in relation to the administration of vocational education in the relevant jurisdiction, but which also have functions which are clearly concerned with the implementation of the National Training Policy. Thus, this legislation provides for State Training Authorities and other statutory bodies for the administration of VET within each jurisdiction, and for the allocation of powers, executive and legislative, for the implementation of the legislation.[9]



Read together, the functions and powers of ANTA in the (Cwth) *Australian National Training Authority Act 1992* and the functions and powers of the State Training Authorities, all of which are to be exercised subject to Ministerial direction, do give effect to a coherent national legislative strategy with respect to the development and implementation of VET policy. These also reflect the fundamental objective of establishing a national training system in a federation in which the powers relating to education lie with the State and Territory governments not with the Federal Government, but which is also a federation in which the Federal Government is able to use its financial powers to influence the development and implementation of State and Territory policies relating to education. These administrative structures in the federal and State and Territory

legislation cannot be said to duplicate each other. The clear intention in the National Agreement and in the legislative instruments is that the National Training Policy will be developed by a consensus between the Federal Government and the governments of the States and Territories. However, s 14A of the *Australian National Training Authority Act 1992*, although of limited duration, clearly contemplated the unilateral exercise of financial powers by the Commonwealth to provide a sanction against any State or Territory which failed to comply with the National Agreement. This aside, consensual co-operative decision-making clearly requires that there be appropriate structures in the federal and State and Territory administrations to undertake this work of developing agreed policy and protocols for its implementation. Nevertheless, given the powerful role accorded the Ministerial Council in the (Cwth) *Australian National Training Authority Act 1992*, and the powers of the Ministers in the State and Territory legislation, there is potential for disagreement between the Commonwealth and the States and Territories about the development of a National Training Policy, and the implementation of that policy in the States and Territories. Given the constitutional context of the provision of VET it is difficult to see how this potential for disagreement can be eliminated.

Insofar as the establishment of State and Territory Training Authorities is concerned, the legislation of the States and Territories is generally consistent, with the exception of New South Wales. One statutory body is given a broad co-ordinating role in the provision of VET and regulatory control over a number of aspects of that provision, even though in some jurisdictions there are other statutory bodies established under the legislation, and/or there is additional legislation relating to the regulation of the public providers of VET. In each of these jurisdictions there are also other statutory bodies, but in each case it is the State or Territory Training Authority which has responsibility for the broad co-ordination of policy and multiple regulatory roles in the implementation of specific aspects of policy. Generally speaking, in their constitution, appointment of members, and the powers and obligations of members these State and Territory Training Authorities are broadly similar, although there are different models in the constitution of these bodies evident across the legislation. However, without exception, these State Training Authorities, however constituted, are required to act according to Ministerial direction. Further, although the regulatory scheme in New South Wales is different, the scope of the regulatory roles for which the legislation provides is similar to that of the other jurisdictions, and the statutory bodies are expressly stated to be subject to the direction and control of the Minister, which is, of course, similar to the position in the other jurisdictions.[10] Consequently, it seems unlikely that the different models of constituting the State Training Authorities are of great practical significance in the implementation of the legislation, and that consequently the legislative frameworks are, for all practical purposes in the implementation of policy, consistent.

In each State and Territory, it is the State Training Agency which is responsible for liaison with ANTA for the co-operative development of protocols for the development and implementation of the National Training Policy.[11] There are differences between the States and Territories in the legislative provision for the nomination of the State Training Agency. In summary, in most jurisdictions, it is the State Training Authority—or in the case of New South Wales, the Board of Vocational Education and Training—which is either nominated as the State Training Agency or made responsible for liaison with the federal body, but in South Australia this responsibility is a Ministerial function and in Western Australia it is a function of the government department administering the vocational education legislation. Further, only in the legislation in the Australian Capital Territory, Queensland and Victoria is there an express conferral of functions on ANTA in relation to the particular State or Territory. *Prima facie* the State and Territory legislative frameworks are not consistent in their legislative provisions in this matter. However, despite the different legislative arrangements as to the nomination of the State Training Agency, it seems likely that the intra-jurisdictional administration of the development of State Training Profiles and the collaborative development with ANTA of the National Training Policy under the National Agreement is effectively similar in all jurisdictions, particularly insofar as the provisions relating to the sources of statutory advice and the Ministerial powers are concerned. Further, in relation to the implementation of National Training Policy, it is difficult to identify from textual analysis what, if any, is the practical significance of the inclusion or omission of the provisions relating to the conferral of powers on ANTA in the State and Territory legislation, although the inclusion of these provisions certainly reinforces the legislatures' acceptance of the collaborative nature of the task of developing and implementing a National Training Policy. The extent of the comparative practical significance of these provisions in the Australian Capital Territory, Queensland and Victoria has not been tested in the courts.



Given the different purposes of the federal legislation and the State and Territory legislation, it is arguable that they can be fairly categorized as being complementary insofar as the establishment of administrative structures are concerned, both in the development of the broad policy framework and as conduits for the disbursement of funds, which in the VET sector are paid to the States and Territories and not to the individual institutions as occurs in the higher education sector. This complementarity is essential to the development and implementation of a complete legislative framework for the development of National Training Policy, and it may fairly be said that this legislation *prima facie* constitutes a complete and coherent legislative scheme, which is not marred by unnecessary duplication.

Given that the legislative scheme of each jurisdiction is determined by distinctive historical, demographic, geographic and political traditions, and that consequently the legislation is similar but not identical, it is not surprising that no

one legislative model has been used. Nevertheless, the legislation is generally consistent insofar as the constitution, powers and functions of the State and Territory Training Authorities are concerned. Further, the legislation in all jurisdictions is generally complete in the coverage of the regulatory fields. The exercise of the powers and functions of the statutory authorities, which are responsible for the implementation of government policy, should enable them to give effect to a coherent strategy with respect to VET and to reflect the fundamental objectives of government policy in VET. It is certainly arguable, that, despite the differences between the several jurisdictions, the VET legislation provides rational legislative frameworks for the provision of VET in the States and Territories. Further, it does not appear on a reading of the legislation that there is *prima facie* any evidence of duplication and imprecision in the administrative structures established under the State and Territory VET legislation. The powers and functions of the bodies are clearly delineated in the relevant Acts.

### 3.2.2 The regulation of the public providers of TAFE

The regulation of the provision of educational services in the States and Territories is a fundamental determinant in the implementation of the National Training Policy. Given the historical, geographical, demographic and economic diversity of the several Australian States and Territories, it is unlikely that a single regulatory model would have evolved. Consequently, it is not surprising that the legislation regulating the public providers of TAFE is not consistent in the provision it makes across the several jurisdictions. This insight was confirmed during the qualitative interviews:

> *You certainly, at the State level, have a mix of arrangements where the individual TAFE institutes have more or less autonomy or self managing capacity, but nonetheless, they still tend to have a fairly detailed financial or resourcing relationship with the State agency.*



The reasons for this situation are not difficult to identify. In the first place, there is a variety of legislative instruments in the regulation of the public providers of TAFE in the various States and Territories. These can include the principal vocational education and training Acts, dedicated legislation relating to particular institutions, university legislation in some jurisdictions, and also in some jurisdictions, special legislation or special legislative provisions for the regulation of providers of Adult, Community and Further Education (ACFE). Secondly, there is a significant variation in the degree of operational autonomy accorded individual TAFE institutions in the legislative instruments of the various States and Territories, and this, of course, depends upon the particular policy adopted by the government in each jurisdiction.[12] The regulatory framework of the provision of TAFE in New South Wales can be reasonably characterised as the most centralised, and the regulatory frameworks in Queensland, South Australia and Western Australia, albeit that they may still

fairly be described as centralised systems, nevertheless provide formally for some degree of devolution of operational decision-making within the individual colleges. Greater operational autonomy is evident in the regulation of TAFE institutions in the Northern Territory, Tasmania and Victoria.

Although there is no consistent matrix evident in the organisational structures in the regulatory legislation, that legislation, without exception, provides comprehensively for the powers and functions of public TAFE institutions and ACFE institutions, and for their administration. The general provisions of the statute law are usually expanded by subordinate legislation, which addresses particular administrative details. In this respect, it can reasonably be said that this law is complete, that it accords with the goals of government policy within each jurisdiction relating to the provision of TAFE, and that it facilitates the implementation of policy without duplication and imprecision. However, one further point needs to be made. The States and Territories are responsible for most of the financing of their VET sectors, and how this finance is distributed, including the percentage which is determined to be contestable, is a policy matter which is governed by legislative instruments other than the VET legislation.

### 3.2.3 The development of the National Training Framework

A key element in the current National Training Policy is the development of the National Training Framework, which is concerned with the national accreditation and recognition of VET. The goal of this policy is to develop the Australian Recognition Framework to simplify the recognition of training organisations and training products and to assure the quality of training provision. In the Training Packages which are being developed for every industry, training and assessment are to be directly linked to competency standards developed and accredited by national ITABs. These training packages are submitted to the National Training Framework Committee of ANTA for endorsement. Under the Australian Recognition Framework there is to be a new emphasis upon the registration of training organisations and the mutual recognition of these organisations and of their products in the various States and Territories. The policy goal is the achievement of national consistency in standards and the recognition of training organisations. Training is to be directly linked to nationally endorsed competencies which are established by industry. There seems to be a considerable lessening of emphasis upon the accreditation of courses, that is of their content and procedures, as a key quality assurance mechanism.[13]



The role of the registered training organisations was an issue about which useful insights were gained during the qualitative interviewing:

> *They [registered training organisations] . . . are certainly going to have a very large role to play in the whole scheme of things . . . the role that the RTO is going to play in the assessing, the recording of the assessment, the monitoring of the on-the-job skills required to make sure that you are competent . . .*

*Of course, the new National Training Framework makes it absolutely clear that once you've got the national endorsement of the standard or the package, the rest of the quality assurance of the system relies entirely on the States' registration of providers and the industry has no further role in that.*

Similarly, possible legislative implications of the process of the development and introduction of the Training Packages were also drawn to our attention:

*Those qualifications in the VET sector will be made out in training packages, which will be endorsed nationally and therefore there is no need for the State in turn to be going through a second process of approving particular courses of study for apprenticeships and traineeships.*

*There are some real issues around assessment that need to be dealt with, resolved pretty quickly. Training packages also are coming along more slowly and people don't really understand what they are.*

The laws across these State and Territory jurisdictions are not consistent in the sense that they are not identical in the organisational structures provided to deal with issues of accreditation of courses and the registration of providers, but they are rather more similar, although again not identical, in their provisions relating to the functions and determinative powers of the statutory bodies established to carry out this work. These provisions are generally complete in that they provide sufficient powers for these boards to carry out their functions.[14]

It cannot be too strongly emphasized that the law relating to VET is in a state of transition. However, this said, it must be acknowledged that, strictly speaking, at the time of writing, the law relating to the accreditation of courses and the registration of providers in several jurisdictions does not seem to fully support the new emphasis in the National Training Framework policy upon the registration of training organisations and the development of national industry-based Training Packages. At the time of writing changes have been made to the Victorian legislation, and are being made in the Queensland legislation, and amendments to the Tasmanian legislation are foreshadowed. It is understood that no changes have been yet been made to the legislation in the other State and Territory jurisdictions. The amended Victorian legislation[15] and the draft Queensland legislation, which also provides for the devolution of responsibility, coupled with the retention of supervisory powers by a central authority,[16] indicate the nature of the legislative changes which might be expected if the new emphasis of the National Training Framework policy is to be fully supported by the legislation.



There is another perspective from which the development of the National Training Framework policy and the Australian Recognition Framework may be viewed. To this point we have examined the statutory support offered in the State and Territory VET legislation. However, it is at least arguable that the provisions of the Commonwealth, State and Territory Mutual Recognition legislation, which *inter alia* provides for the application of the mutual recognition principle in the recognition of qualifications at least where occupational licensing legislation is in

force, could provide an additional source of statutory support for the development of the Australian Recognition Framework, albeit that the latter is concerned with the mutual recognition of training organisations and their products to achieve national consistency in standards relating to occupational skills and competences rather than a statutory qualification *per se*.

Section 3 of the (Cwth) *Mutual Recognition Act 1992* provides that:

> *The principal purpose of this Act is to enact legislation authorised by the Parliaments of States under paragraph (xxxvii) of section 51 of the Commonwealth Constitution, and requested by the legislatures of the Australian Capital Territory and the Northern Territory, for the purpose of promoting the goal of freedom movement of goods and services providers in a national market in Australia.*

Part 3 of the Act deals with occupations and s 17(1) states that:

> *The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:*
>
> *(a) to be registered in the second State for the equivalent occupation*
>
> *(b) pending such registration, to carry on the equivalent occupation in the second State*

There is an exception to this principle in s 17(2): it does not affect the operation of State laws which regulate the manner of carrying on an occupation, provided that those laws apply equally to all persons seeking to carry on that occupation, and 'are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.' Section 18(1) provides that this Part applies to individuals and to occupations they carry on. The Act defines what is meant by 'occupation' and 'registration', and the remaining relevant provisions of the Act deal with procedural matters such as the individual person's entitlement to registration, what constitutes 'equivalent occupations', the procedures for Ministerial declarations as to equivalent occupations and the review of decisions by the Commonwealth Administrative Appeals Tribunal.



If the existence of State and Territory mutual recognition legislation may be taken as a guide, then there has been within a few years the development of a coherent national scheme for the mutual recognition of qualifications which fall within the scope of the legislation, which is: the (ACT) *Mutual Recognition (ACT) Act 1992*; the (NT) *Mutual Recognition Act (NT) 1992*; the (NSW) *Mutual Recognition Act 1992*; the (Qld) *Mutual Recognition (Q) Act 1992*; the (SA) *Mutual Recognition (SA) Act 1993*; the (Tas) *Mutual Recognition Act (Tas) 1993*; the (Vic) *Mutual Recognition Act 1993*; and the (WA) *Mutual Recognition Act 1993*. Although the legislation does not appear to address the issue of how mutual recognition agreements are made, it seems that in practice, insofar as it relates to occupations, two or more States decide, by the exercise of executive power, to enter a mutual recognition agreement in relation to the recognition of occupational qualifications.

It is submitted that the definitions of 'occupation' and 'registration' in this Mutual Recognition legislation are broad enough to cover at least some of the occupations for which the training and the qualification are achieved through the educational services provided by the VET sector, and which presumably would be recognised under the Australian Recognition Framework. In the Commonwealth Act, and in the State and Territory Acts:

> *'occupation' means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper), and includes a specialisation in any of the above in which registration may be granted.*

The limiting element in this definition is that the occupations are of a kind 'that may be carried on only by registered persons.' Similarly, what constitutes 'registration' for the purposes of the Acts is defined as follows:

> *'registration' includes the licensing, approval, admission, certification (including by way of practising certificates), or any other form of authorisation, of a person required by or under legislation for carrying on an occupation.*

The limiting element of the requirement for registration is that it should be 'by or under legislation for carrying on an occupation.' If these words are narrowly interpreted, they could be taken to refer only to legislation governing licensing for specific occupations. If this is the case, then it would seem that the national recognition of skills and competencies in at least those occupations where there is statutory occupational licensing could be facilitated by the development of Mutual Recognition Agreements between the States and Territories. Of course, such a course of action may well have been considered, but rejected because of the limitation of the legislative requirement for registration.

### 3.2.4 The role of industry in the formation of the National Training Policy



The (Cwth) *Australian National Training Authority Act 1992* clearly provides that industry is to have a major role in the formation of the National Training Policy.[17] Furthermore the State and Territory legislation usually provides that the vocational education and training provided in a particular jurisdiction should be relevant to the needs of industry.[18] However, this survey of the law relating to VET has suggested that there is really very little formalized statutory support in both the federal and the State and Territory legislation for the policy of involving industry in the development of the National Training Policy, albeit that in practice there may be considerable industry input into policy development through the appointment by Ministers of leaders of industry and commerce to relevant to statutory bodies, and by industrial organisations of both employers and employees. These provide their considerable expertise and understanding of industry training requirements through what are not necessarily statutorily-based consultative processes, although they might well be that when aspects of

training requirements are included in instruments prepared under industrial law. Nevertheless, the policy emphasis upon the role of industry, albeit that it is not statutorily formalized in most jurisdictions, may still be subject to criticism in terms of its completeness.

In relation to the policy mandated role of industry neither the federal nor the State and Territory legislative frameworks for VET can be said to be *prima facie* complete and consistent. The apparent gaps in the legislation are twofold. In the first place, there is no consistency across the jurisdictions in any requirements for statutorily-based industry representation on the key statutory authorities.[19] In the second place, it is only the current Tasmanian *Vocational Education and Training Act 1994* and Victorian *Vocational Education and Training Act 1990* which actually provide for statutory-based industry training boards, although both the Queensland *Vocational Education, Training and Employment Act 1991* s 14 and the South Australian *Vocational Education, Employment and Training Act 1994* s 6(6)(a) specifically recognize industry training advisory bodies for consultative purposes.

The importance of this apparent gap in the legislation was explored during the qualitative interviews. Insights gained included the following:

> *It is very important for industry to play a role . . . certainly they [the ITABs] have a large role to play here in reviewing training programs . . .*
>
> *[The] declared bodies under the ANTA Act . . . are declared by the Ministerial Council—National Industry Training Advisory Bodies (ITABs) . . . [T]he system now, by agreement at the Ministerial Council level, says that qualifications in VET will be based on competency standards that have been nationally endorsed by a committee of the ANTA Board, the National Training Framework Committee, which itself is composed of the States, industry and the Federal Government.*
>
> *The essence of the ANTA legislation is about industry leadership of the system.*
>
> *The interesting question is to look exactly at the powers of each of these Boards. Most of them have something more than advisory power, but stop short of final determinative powers . . . Most of them have power that needs final approval from the Minister.*



The issue seems to be whether or not the policy of active industry involvement in the development of the National Training Policy would be enhanced if there were to be more formalised legislative recognition of the importance of the role of industry in the formation of VET policy. An answer to this question cannot be provided by this research, but the historical overview and the survey of the law and policy relating to VET have highlighted certain key roles played by industrial parties in training through the operation of industrial relations law and in the operation over half a century of the (Cwth) *Tradesmen's Rights Regulation Act 1946*.[20]

### 3.2.5 The New Apprenticeship Scheme

One of the key functions of the State and Territory legislation relating to the regulation of VET is the regulation of apprenticeships and traineeships. It is also evident from the both the historical overview and from the survey of the law relating to VET that, throughout the twentieth century in Australia, it has been accepted that the VET law regulating apprenticeships must be consonant with the industrial relations law regulating the employment relationship in apprenticeships.[21] The current key policy development in the regulation of apprenticeships and traineeships is the introduction of the NAS, which removes the previous regulatory limitations that traineeships and apprenticeships were only to be available in what were variously described as 'declared trades', 'declared vocations' or 'declared callings', were only to be available to persons of certain ages, were based on a 'time-served' concept, and were limited to full-time employment. Further the policy relating to New Apprenticeships requires that the training to be provided under training agreements must be in accordance with the requirements of the relevant industry Training Package, that is accredited within the National Training Framework and provided by a registered training organisation.[22] One objective of the NAS is to facilitate new apprenticeships and traineeships encompassing greater flexibility in training and employment requirements consistent with industrial awards and agreements. The new system's flexibility flows from the ability in the Training Packages to move away from the rigidity of the traditional procedures of declaring vocations to a more flexible model in which it will be easier for the system to respond to the application of changing technologies in industry. Other aspects of this new flexibility include the move in emphasis from the accreditation of curricula to the registration of training organisations and the assessment of competencies, the move to the customisation of training needs for industry, and the reconsideration of the structure of training wages. The nature of the policy developments was summarized in this very useful insight provided to the researchers:

> *'New Apprenticeships' is a generic term used for about six different reforms that are quite different from each other . . . there's been reforms to the ways apprentices and trainees can be employed and the employment conditions reforms so that you can have part-time apprentices and traineeships and you can allow them to commence while at school, and you can now have an Australian Workplace Agreement, a Certified Agreement, for the apprentice and trainee. They're administratively and policy-wise a very long distance from . . . the decisions around, for example, trying to achieve a consistent framework for the recognition of training providers through an Australian Recognition Framework, which is also part of what has been bundled together as New Apprenticeship Reforms. And they're different again to the reforms to qualifications . . . the Training Package reforms.*



Such a complex policy bundle clearly is likely to have implications for the further development of the regulation of VET and the consistency between training agreements and the award system.

At the time of writing there is a distinct lack of consistency across the State and Territory legislation relating to apprenticeships and traineeships insofar as legislative support for the NAS is concerned. In the first place, there is no consistency as to the removal of the concept of 'declared vocations'. In the second place, there is no express provision in the VET legislation, except in the Queensland Draft Vocational Education and Training Bill 1997, which deals with the move from the 'time-served' approach to the achievement of competences approach. In reference to this issue it may be noted that it was clear to the researchers from several of the qualitative interviews that:

> *It's one of the important shifts in New Apprenticeships from the old system, that it's no longer a time served approach.*

In the third place the maintenance of the traditional consonance between the VET legislation regulating apprenticeship and the industrial relations law dealing with apprenticeship seems still to be in a state of transition. In the fourth place, although the legislative provision for grievance procedures for the resolution of disputes relating to apprenticeship remains in many ways unchanged, there is some evidence of variations between the legislation in the several jurisdictions particularly in relation to the statutory authorities which are charged with the responsibility of dealing with disputes, in relation right of legal representation, and in relation to appeal procedures. Further, the extant VET legislation regulating these dispute resolution procedures does not reflect the current trend towards the use of mediation as a prime procedure in dispute resolution.

However, it must be remembered that this legislation is very much legislation in transition. At the currency date for this project, 1 March, 1998, the detail of the proposed amendments, if any, to the legislation in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia and Tasmania had not become available. Only the Victorian legislation had been amended by the *Vocational Education and Training (Training Framework) Act 1997* to specifically accommodate the new policy by removing the regulatory limitation of 'declared vocations' and by providing for the new elements of training agreements, although the current legislation in Queensland and in Western Australia has evolved to the point where the concept of 'training schemes', which could include 'declared' or 'prescribed' vocations but was not limited to these, have been introduced.[23] However, in Queensland, the Draft Vocational Education and Training Bill 1997 foreshadowed the legislative changes to be made in that jurisdiction to accommodate the NAS. The Bill does not use the terms 'apprentice' or 'trainee', but relies instead on the core concept of the 'training contract',[24] which is to be developed in accordance with the objectives and principles provided for in the legislation, and to be registered by the chief executive or by an approved administering body. Supervising registered training organisations will provide the training that complements the training to be provided by the employer under the contract and issue the qualification.[25]

It may be noted that in both the amended Victorian legislation[26] and in the proposed Queensland legislation other provisions relating to training agreements and training contracts are generally similar to provisions in the traditional legislation. For example in the Queensland Draft Bill there are statutory responsibilities placed on employers, although not specifically on employees,[27] and provisions relating to the assignment and cancellation of training contracts.[28] There are also provisions relating to the appointment of inspectors to see that training is being carried out according to the contract, and provided for sanctions to enable the adequate enforcement of the terms of the contract.[29] However, certain other provisions in the Bill relate to the formalities required for the completion of a registered training contract,[30] and it is arguable that these provisions very clearly reflected the requirements of the Training Packages and the flexibility which the NAS has introduced. For example, s 58 provides:

> *(1) This section applies, despite the nominal term of a registered training contract, if before the nominal term of the contract ends, the supervising registered training organisation of the person being trained under the contract—*
>
> *(a) is satisfied the person has achieved the competencies required under the contract and*
>
> *(b) issue to the person the qualification stated in the contract*
>
> *(2) The training contract ends when the supervising registered training organisation issues the qualification.*

In s 59, which provides for a delayed completion, the nominal term of the contract may be extended only if the chief executive or administering body 'reasonably believes the person being trained under the contract would not be able to achieve the competencies required under the contract in the nominal term'. This legislative model clearly integrates the policy features relating to the flexibility to be gained by the move from the 'time-served' to competency-based achievement in training into the regulatory framework. As has been noted, it is not at present clear what amendments will be made in most jurisdictions.



The traditional consonance between VET legislation and industrial relations law regulating the employment of apprentices and trainees has been noted, and the developments which are taking place therein have been described.[31] During the qualitative interviews the continuing significance of this consonance emerged:

> *[The States] can step away from the central body with a general understanding of where they are heading, but when they want to put their . . . flesh on the skeleton, then that flesh takes on different shapes and sizes . . . The reason . . . is because you have a Federal I[ndustrial] R[elations] system which you try and fit back onto a State training program, which isn't absolutely identical . . .*
>
> *. . . The other part is this issue about time served and that's a critical issue. A training arrangement allows for flexibility in that, as opposed to the I[ndustrial] R[elations] system. At the moment . . . [this] is First Year Apprentice, Second Year Apprentice, although some Awards have got some flexibility.*

Beyond drawing attention to the changes which have already been made to ensure the continuing consonance between the VET legislation and industrial relations, it is probably sufficient to note in relation to this third aspect of the legislative basis of the NAS that this is still a transitional issue, and the development of a complete, consistent and coherent legislative framework is probably a matter of time. However, there may still be some duplication in the sense that there is more than one kind of legislative instrument available in the industrial relations law field:

> *[The] employment-related law for people doing apprenticeships or traineeships is duplicated between the States and the Commonwealth to the extent that they both go back to an award.*

This source of duplication seems unlikely to disappear.

There is, however, a fourth aspect of the completeness, consistency and coherence of the regulation of apprenticeships and traineeships, which that of the adoption of legislative policies relating to dispute resolution. Traditionally, the regulation of apprenticeship has included provision for the resolution of disputes. As the legislative framework has evolved towards the accommodation of the NAS, this situation has not altered. Although the inclusion of grievance procedures is common to all State and Territory legislation,[32] aspects of these provisions can vary. For example, the authority empowered to determine disputes varies between jurisdictions, and rights of appeal in relation to disputes about apprenticeship agreements also vary from jurisdiction to jurisdiction. Further, although the survey of the legislation reveals that the fundamental principles of natural justice, including the giving of notice and the right to be heard, are woven into the regulatory fabric, the nature of the right to legal representation varies from jurisdiction to jurisdiction. There are two views as to whether the right to legal representation is necessary. On the one hand it is argued that in the absence of lawyers, disputes can be pragmatically and expeditiously resolved without the risk of undue legalistic argument unnecessarily prolonging the proceedings. But, on the other hand, it can also be argued that as between an employer and an apprentice or trainee employee there may be an imbalance of power in the presentation of viewpoints which may disadvantage the weaker of the parties. How this inconsistency between the laws of the several jurisdictions is regarded will probably depend upon which of these arguments an individual finds persuasive. The further point may be noted that the current developments in alternative dispute resolution, which require that mediation and conciliation are tried as preferred dispute resolution processes prior to formal adjudication by adversarial procedures, are being more and more extensively used in the resolution of disputes at dispute resolution centres and in the court systems of the States and Territories. These developments do not seem to have any impact upon the provisions relating to dispute resolution in the apprenticeship legislation—although the provision for a compulsory conciliation conference in s 98 of the Queensland Draft Vocational Education and Training Bill

23.1

1997 would seem to be an exception.[33] It may be noted that there is currently no evidence of any research undertaken in relation to the use and operation of the dispute resolution procedures as they presently exist in both the VET legislation and in the industrial law.

Generally, then, it may be concluded that in relation to the coherence, consistency and completeness of the legislative framework which supports the introduction of the NAS there are some gaps and inconsistencies and a certain lack of completeness in relation to several issues. The removal of the traditional limitations of the 'declared vocation' basis of apprenticeship, the removal of the age limitations on entry to apprenticeship, and the change from the 'time-served' basis of the apprenticeship agreement to the competencies achieved basis are not expressly provided for in the legislation across the several State and Territory jurisdictions, although in practice these policy developments of the NAS may well be incorporated into the actual training agreements. This situation, of course, may well be chiefly a result of the legislation being legislation in transition. Similarly, the maintenance of the traditional consonance between the VET legislation and industrial relations law seems also to be in a state of transition, and this does give rise to apparent technical inconsistences. However, the inconsistencies across the jurisdictions in relation to the grievance procedures and dispute resolution procedures in the laws regulating apprenticeship do not arise from the introduction of the NAS but rather from the jurisdictional differences in the traditional structural features of the legislation.

### 3.2.6 Vocational placement

Workplace training may form part of other VET programs offered by public and private providers to post-compulsory students who are not necessarily undertaking apprenticeships and traineeships under training agreements or training contracts. These other training programs include those offered under the VET in Schools School to Work Transition policy. Relevant insights on the practical use of vocational placements were drawn to the researchers' attention during the qualitative interviews:



> *There is a problem with the safety, with the coverage of the student on the site, and by the nature of some of the sites, some of the work can be quite dangerous . . .*
>
> *Predominantly the school system, and to a degree the TAFE system, have to understand that if they want to increase employer uptake with these sorts of opportunities, they have to be more responsive to the needs of employers . . . They have first of all to be prepared to . . . modify their timetables to fit in with the real needs of employers.*
>
> *One of the issues that is of real concern to employers, however, is the lack of co-ordination in the number of people who are making contact . . . it's not an easy thing to solve, [and] it's particularly a problem in regional centres and country towns where there are small numbers of employers.*

*The value of placements is argued for very strongly, but there are access and equity considerations which can't be negated. There are geographic locations where desirable placements are not possible, and the volume of the system and the desired volume of the system make it impractical too.*

The survey of the legal regulation of VET has revealed that it is only in Queensland, Tasmania and Victoria that there is statutory regulation of vocational placements, which may also be described as 'practical placements' or 'industry placements'.[34] Although this *prima facie* appears to be a gap in the regulation of VET, given the importance of accident compensation insurance and professional indemnity insurance against negligence to both the employers in the workplace and to the management of institutional providers, and the industrial relations implications where such vocational placements are paid placements, it is highly unlikely that these matters are not provided for administratively through the exercise of executive powers. Consequently, the apparent legislative gap may be of no great practical significance. However, this seems to be another area in which empirical research might be used in a comparative study of the effectiveness of the legislated control of vocational placements with the administrative regulation of such placements in terms of the protection of the participants both students and employers.

### 3.2.7 Competition law and VET

It is appropriate to recall that the application of competition legislation is a general policy issue for governments, both federal and State and Territory.[35] Its application in the VET sector has a number of implications. It is linked with the development of the training market concept, which invoked the introduction of competitive tendering, user choice for apprentices and trainees under the National Training Framework, and the introduction of third party access to the public infrastructure.[36] The observance of the separation of the purchaser/provider functions has implications for the regulation and funding of public TAFE institutions. The application of the principle of competitive neutrality, which requires that the infrastructure advantages enjoyed by public TAFE and VET providers will be taken into account in the competitive tendering processes, clearly is relevant to the distribution of funding. The third party access principle is intended to facilitate private providers' access to public owned educational infrastructure. These elements of the National Training Policy, particularly those relating to user choice and third party access, are intended to support the goal of developing an open training market in which providers respond to the needs of industry and individuals. The issue to be examined is how far the current State and Territory VET legislation supports the implementation of these policies.



The survey of the VET law suggested that to date only the Tasmanian and Victorian legislation has been changed in the light of the adoption of competition policy principles, and that there is a persuasive argument that the Northern Territory legislative scheme satisfies the requirement of the separation of the

purchaser/provider roles. It is worth examining the Queensland Draft TAFE Institutes Bill 1997 which presents a clear contemporary statement of how the regulation of the provision of TAFE can be developed to take account of competition policy principles. In the summary provided in the Consultation Draft Bill the influence of the development of competition policy is clearly enunciated:

> *The motivation for devising a separate Act to govern the operations of TAFE arose from the Queensland Commission of Audit Report (1996) which recommended that the Government should separate and distinguish its role as a purchaser of vocational education and training from its role as a vocational education and training provider. Also, the new legislation is necessary to address the dramatic change to the operating environment of TAFE institutes since the current legislation came into force.*
>
> *There has been a rapid growth in the number of registered training providers in Queensland creating a more competitive, client driven training market which is impacting on TAFE institutes. Over 900 non-TAFE providers are now registered to deliver accredited courses. The progressive increase in the allocation of funds by competitive processes has meant that TAFE institutes are now required to compete on a commercial basis for a substantial portion of their funding.*[37]

The Draft Bill proposed TAFE Institute Business Boards, which would be responsible for the management and operations of the TAFE institutes.[38] The functions of the TAFE institute business boards set out in s 8(1) are:

> *(a) to approve the institute's business plan and ensure that it is consistent with the TAFE institute's corporate plan*
>
> *(b) to monitor the implementation of—*
>
> *(i) the institute's business plan and the institute's budget through periodic reports from the institute's director and*
>
> *(ii) policy guidelines and directions issued by the managing director related to the business performance of a TAFE institute*
>
> *(c) to advise the institute's director on business improvement and service delivery strategies*
>
> *(d) to advise the institute's director about industry, business and market trends*
>
> *(e) to advise the department about training priorities and contribute to vocational education and training system planning processes*
>
> *(f) to consult and collaborate with college councils, other institute boards, the Queensland Training Authority, other relevant bodies and the department as far as the board considers it necessary to perform its functions*
>
> *(g) to help the institute through representation on institute committees when appropriate*
>
> *(h) to monitor the outcomes of institute courses, programs and services to individuals, industry and the community and to advise the institute's director accordingly*
>
> *(i) to foster co-operation with other institutes to enhance the quality and consistency of services*

*(j) to promote the institute and its services*

*(k) to report to the Minister on—*

*(i) the board's activities and*

*(ii) the effectiveness of the board's advice and decisions and*

*(iii) another matter connected with the performance of the institute, either on the board's own initiative or at the Ministers's request*

Section 9 provides that the boards are to be subject to the Minister's directions. It may be noted that in the range of functions listed in s 8(1) and the Ministerial power provided for in s 9 are similar to provisions regulating TAFE in all jurisdictions. The current legislative scheme in Tasmania and the proposed Queensland scheme both use the dual legislation model, so that there is a clearly evident separation between the government's roles of being the purchaser of vocational education and training and being at the same time the provider of that training. However, in each of these States, the variation in the structures of the legislative instruments reflects the demographic and geographic conditions within each jurisdiction.

It is evident that although there may be intergovernmental agreement on competition policy reform principles, there is variation over time in the nature and extent of the application of those principles and in the making of any legislative changes which are considered necessary, and this is reflected in the current VET legislation in the States and Territories. Of course, this does not mean that policy changes are not being implemented administratively through the exercise of executive powers by the several governments under the competition policy reform legislation. Indeed, it may well be that this is considered a sufficient response by governments.[39] Nevertheless, insofar as the question with which this research is concerned, namely the extent to which there is support in the legislative instruments regulating VET for those elements of the National Training Policy which relate to the application of competition policy principles, then it does not seem that there has been extensive amendment to date of the relevant State and Territory legislation. Again, this is probably another way in which the legislation relating to VET can be regarded as legislation in transition.



The insights gained during the qualitative interviewing highlighted the complexity of the application of competition principles:

> *These are policy agreements at the Heads of Government level. They are not specific to the VET sector . . . They are matters for individual States and Territories.*
>
> *[The separate legislation as in Tasmania and Queensland] . . . also reflects the broader shift to the purchaser, provider and management in establishing TAFE as a quite distinct identity in the legislation.*
>
> *In terms of competition policy, the difficulty . . . is that . . . you've got a situation in a number of States, where the head of the department is both the head of the purchasing body and the provider.*

As far as the fostering of competition between public and private providers of TAFE is concerned, the insights offered may be fairly summarized in these words:

> *The private provider argument is: 'We don't have your infrastructure . . . Therefore, it's not a level playing field.' The public provider response is: 'You also don't have our community service obligations. You're not expected to provide this, and this . . .'.*

Generally speaking these insights affirmed the researchers' impressions that although the competition reform policy is a comprehensive one, and although the elements of the policy, the purchaser/provider split, competitive neutrality, user choice and third party access certainly address the objectives of competition policy in its application to the VET sector, the implementation of these policies is a matter for the State and Territories, which do not necessarily implement policies at the same time and in the same manner.

### 3.2.8 Access and equity

It has been noted in the survey of the legal regulation of VET that the implementation of the principle of access and equity in the VET sector is supported by a variety of legislation the application of which is general and not confined to the VET sector.[40] Further, what emerged clearly from the qualitative interviews was the insight that where VET policies are actively targeted to the implementation of the principle of access and equity, the implementation of these policies is likely to be linked to funding policies:

> *[Under the ANTA Agreement] States and Territories were obliged in their profiles to show everything stated giving support to disadvantaged groups in the community and were funded accordingly.*
>
> *Some of those [access and equity] programs are systemic and some of them are, if you like, more targeted add-ons to try to bring disadvantaged people in.*

Taken together, the anti-discrimination laws and the proposed social security laws of general application do provide a complete, consistent and coherent framework within which the funding of targeted policies may be used for the effective implementation of general principles of access and equity. However, recent policy changes have seen a distinct decline in emphasis upon labour market programs which were used during the 1980s and early 1990s to improve job-related skills and vocational training opportunities of unemployed persons and disadvantaged groups.[41] Further, it is as yet unclear whether the NAS requirement for employment prior to the undertaking of training will militate against the access of particular groups to this training system, despite its emphasis upon flexibility and broadening of access to training.

# 4 The legislative framework of VET and its relationship with changing labour market conditions

The fifth specific objective of this research was to examine the nature of the link between the legislative framework of VET and labour market conditions, an objective which arose from the origins and rationale for the research. There are a number of indicia which suggest that the development of the legislative framework of VET has been consistently related to the development of policies which were concerned to provide a skilled labour force in Australia. In a general sense the typical policy rhetoric throughout the twentieth century in Australia has been that the provision of effective vocational education and training has been an essential pre-condition for successful economic development. The contemporary federal legislation is concerned with the development of a national vocational education and training system, and in general terms it can be said that in all Australian State and Territory jurisdictions the vocational education and training law has been concerned with the establishment and organisation of appropriate provision of post-compulsory technical and further education, as well as with the regulation of apprenticeship. In industries where traditional apprenticeship training was the norm, the recognition of the tradesman's skill was the basis upon which wage fixing principles were developed. The regulation of apprenticeships not only covered the conditions of employment for apprentices, but also effectively enabled the numbers of individuals who entered trades to be controlled. This regulation relied upon a quality control mechanism which was predicated on the validity and reliability of the time-served concept, but was also supplemented by the regulation of occupational licensing where issues of health and safety in the workplace and public health and safety arose. These measures which dealt with the employment of apprentices and trainees were essentially part of the legal regulation of the labour market, and were only concerned with educational goals insofar as the regulatory framework of the conditions of employment covered the theoretical and practical training the apprentices and trainees were to receive.[42]



During the second half of the twentieth century, changes in labour market conditions resulted in increased concern about the public provision of TAFE to provide training other than trade training. There was concern for the articulation of post-trade higher level technician training, the demand for which had expanded as the nature of the technological skills required in the labour market changed. There was also increased concern about middle-level skills. Further, also in response to changing conditions in the labour market since the 1970s, which saw increased unemployment, particularly youth unemployment, a similar regulatory framework was established across the State and Territory jurisdictions for traineeships, which provided training in industries which had no

established traditional apprenticeship system. There was also the introduction of the concept of the training wage to enhance participation in training. During the late 1980s award restructuring was introduced which used competency standards as the basis of award structures, but generally these did not translate into a basis for the determination of wage levels in the award system. There was some limited policy development in the early 1990s in relation to the integration of key competencies into middle-level training and targets were proposed for increased workforce participation in this higher level post-trade training. These changes were accompanied during the 1980s and the early 1990s by the introduction of supplementary labour market programs which were concerned to provide basic work skills to enable unemployed persons to enter the labour market.[41]

Despite the evidence over time of the indicia which suggest that the general development of the legislative framework of VET has been consistently related to the development of policies which were concerned to provide a skilled labour force in Australia, the categorisation of the legal framework of VET as belonging only to a single policy area is problematic. It is more helpful to characterise the VET policy area as one in which a number of policy areas intervene and overlap. VET policy in general sense does relate to changes in the labour market, but it is also specifically drawn from and impacts upon education policy, social policy, and industrial relations policy. Upon one view it has been the industrial relations agenda which has been the dominant policy force in VET, particularly at times of major change in the VET system or VET strategy.

It is necessary to recognise, therefore, that there is a range of views available on this difficult issue, and that it is one which it is not possible to determine definitively in this report. Nevertheless some factors which would be relevant to such a definitive determination may be noted and these would be drawn from the answers to certain key questions. What government department was the source of policy? How closely were the industrial parties, that is the employers and unions who can also be described as the social partners in the industrial relations system, involved in the formulation of the policy and the regulation of its implementation? To whom were the policies basically directed, that is whose responsibility was it to give effect to the policy? Was it educational institutions or was it employment and/or industrial relations institutions? And finally, how much of the content of the policy was concerned with educational aspects as compared with the policy content which was concerned with employment and industrial relations aspects? To provide useful answers to these questions would require further research, and it is not within the scope of this report to undertake this analysis. However, it is possible to point to some developments which illustrate the multi-variate policy concerns of the legislative framework of VET and it relationship with changing labour market conditions.



From the time of the passing and implementation of the (Cwth) *Employment, Education and Training Act 1988* and the establishment of the Commonwealth Department of Employment, Education and Training as a super-department, the

policy relating to education generally, including VET, has very clearly been concerned with labour market changes, that is with changing employment opportunities. The emphasis on flexibility of training provision in the NAS suggests that this current policy development is also concerned with the relevance of VET to labour market conditions. Similarly, the policies relating to School to Work Transition are concerned to improve pathways from post-compulsory school levels into the workforce, and as such are intended to improve the quality and relevance of the supply of labour available to the labour market. The development of a National Training System, which was characterised by the development of the National Training Policy and of the National Training Framework, is similarly an educational policy directed towards the providers of VET, that is the TAFE institutions, both public and private. The common underlying theme of all these policies is to make the provision of VET attuned to the needs of the labour market, a goal which seems likely to receive further support from the application of competition policy reform.

The development of labour market programs, which were, as part of social policy concerned with enhancing the job skills of persons to enable them to enter the labour market rather than only offering income support to those persons, were administered in conjunction with the social security provisions, but necessarily drew upon the resources of the VET sector. The current Youth Allowance policy, with its concern that young people should be either looking for full-time employment, studying full-time, undertaking a course of vocational training or undertaking an approved combination of part-time activities, seems similarly to reflect a continuing social policy thrust which emphasizes the relationship between education and training and the changing labour market. Thus the provision of VET contributes to the achievement of social policy goals.

That VET in particular was to have focussed labour market objectives, which were clearly part of industrial relations policy, was signalled by a number of developments. The traineeship programs, based essentially upon the traditional apprenticeship model, which were developed extensively during the 1980s, represented an extension of the direct interface between industrial relations policy and educational policy beyond the traditional apprenticeship, again with the fundamental object of ensuring that the training system met the recognised needs of industry. The policy goal of the now-repealed (Cwth) *Training Guarantee Act 1990* and associated legislation was to increase industry involvement in the provision of VET targetted to labour market needs. Similar concern about the relationship between VET and skill development and labour market changes was evident in the introduction of award restructuring in the late 1980s, which was concerned with the breaking down of traditional skill demarcation and the development of a multi-skilled workforce. The aim of award restructuring was not only to improve the quality of the workforce, but also to facilitate the movement of the workforce between industries to deal with variations in the

demand for labour in particular industries. Further the introduction of the National Training Wage was also directly concerned with the implementation of appropriate VET within industry. However, as we have noted further, research and analysis is required before the policy elements can be definitively characterised, and further research is also required to comment definitively on the long-term success of otherwise of these policies of generating industry involvement in the development of education and training. At the time of writing the National Training Wage policy is a continuing one, but the training guarantee policy has now been abandoned and the long-term outcomes of award restructuring will only be determinable by means of further empirical research. Similarly, the long-term effectiveness of the accommodation of the flexibility of NAS within industrial relations law remains to be determined in the future.

Generally speaking, it is arguable that VET policy is comprised of a number of overlapping and interrelated policy areas, and that over the past decades consistent and sustained attention has been given to the development of a vocational education and training policy which has had as its goal making the provision of VET responsive to the needs of the labour market. This has been described as the National Training Reform Agenda. When the regulatory framework of the provision of VET is examined, it is not surprising to find that although the legislative framework of education and training has been used as a primary vehicle for the implementation of this policy, other regulatory provisions such as the industrial relations legislation and social security law, and for some years the provisions of the training guarantee legislation, have also been used to support the policy of making the provision of VET responsive to the needs of the labour market. It may also be pointed out that VET policy does not cease to be educational policy because it is supported by legislative frameworks other than that which supports education and training.

# 5 Conclusion



This study has described contemporary policy relating to VET in Australia and has asked the question: to what extent do the current laws relating to VET support the development of a national system of vocational education and training? It has also explored three hypotheses relating to law and policy in VET:

- that the law and policy on VET have not evolved in a systematic manner
- that the law and policy on VET do not provide a rational, coherent or internally consistent program for VET in Australia
- that the law and policy on VET do not provide adequate guidance for people working in VET

The exploration of these hypotheses was assisted by examining law and policy according to four conceptual criteria: transparency, completeness, coherence and consistency. The link between the legislative framework of VET

and changing labour market conditions was also briefly examined. What have we learned from this endeavour?

In the first place, it cannot be said that the law and policy on VET have not evolved in a systematic manner. The underlying theme of the development of law and policy relating to VET in Australia during the twentieth century has been the need to develop the national economy, and in the final decades of the twentieth century the force of the proposition that the provision of an appropriately skilled labour force has been the task of VET has not diminished. Contemporary policy relating to VET is driven by the desire to develop a national vocational education and training system, which is concerned to provide a supply of appropriately skilled persons who can participate in the labour market. The federal and State and Territory legislative frameworks have, during the past decade, been modified to accommodate new policy developments and it can be fairly said that the VET legislation, and also the complementary industrial relations law, are bodies of legislation which are still in transition in relation to the continuing development of VET policy. This process may fairly be characterised as a systematic one, albeit that the amendment of legislation across the State and Territory jurisdictions tends to take some time. Similarly, it can be noted that the application of competition reform policy will vary according to the development of policy initiatives within the State and Territory jurisdictions, and the development of particular programs relating to the implementation of principles of access and equity will also be affected by funding policies of the federal, State and Territory governments.

In the second place, it cannot be said that the law and policy on VET do not provide a rational, coherent or internally consistent program for VET in Australia, when examined in relation to their completeness, consistency and coherence. As far as these conceptual criteria are concerned, it is arguable that, because the law across the several jurisdictions is often similar but not identical, no readily identifiable legislative model emerges, as it does, for example, with the Competition Policy Reform legislation or the Mutual Recognition legislation. It is true that the Australian Commonwealth government and the governments of the States and Territories have by agreement passed identical laws to ensure national uniformity in the application of certain policies. However, this kind of statutory model has been adopted for aspects of government which are different in their nature from the complex task of the development of a national training system. The schemes for the Mutual Recognition legislation and the Competition Policy Reform legislation are concerned with the implementation of strategic general policy of broad application rather than with the establishment of systemic administrative structures to implement policy in a particular field. Given that the nature of much of the law which relates specifically to VET is essentially concerned with the establishment of organisational structures for the administration of VET, and with the allocation of powers, executive and legislative, for the implementation of that legislation, its scope in the light of this

aim can be considered reasonably consistent, complete and coherent. This may also be said to be the case insofar as this law is concerned with Ministerial and bureaucratic relationships between the Commonwealth and the States and Territories which are the vehicle for the development of the National Training Policy. Given the Australian constitutional context, these intergovernmental relationships probably work as completely, consistently and coherently as the Australian federal structure allows, and do seem to be supported by the several legislative frameworks.

Nevertheless, the differences between the administrative structures established by the State and Territory legislation for the provision of VET may suggest that there is some lack of completeness, consistency and coherence. However, for this to be the case, it must be assumed that there is one model which would be the ideal model for all jurisdictions in the Australian federal system. Given the historical, geographic, demographic and economic diversity of the several Australian States and Territories, it is probably very unlikely that one legislative model would suit all jurisdictions equally well. As it is, there is a general preference discernible in the States and Territories for a unitary State Training Authority with a broad co-ordinating role and regulatory powers in a number of fields, but there are differences in how the functions and powers of complementary statutory bodies are defined in each jurisdiction. There are also differences in the organisational structures for the provision of TAFE and ACFE. However, insofar as the provision of VET is concerned, it is arguable that in all jurisdictions the regulatory fields are comprehensively covered. It is certainly arguable that it does not necessarily follow that if identical administrative legislative structures were to be adopted in all jurisdictions, that they would necessarily be more effective that those which are currently operative.

There are *prima facie* apparent gaps, for example, in the legislative provision for the NAS in both VET legislation and industrial law, and in the legislative provision, wherever located, for vocational placements. However, such gaps may be simply the result of the fact that the VET legislation is legislation in transition, or they may be simply of no practical significance in that they are remedied administratively by the use of executive powers. Insofar as the regulation of apprenticeship is concerned, it is evident that there has traditionally been consonance between the dedicated apprenticeship legislation and industrial relations law, and that this is a continuing feature of the regulation of apprenticeship under the NAS, albeit that, at the currency date of 1 March, 1998, some of this legislation is also legislation in transition. It may be noted, however, that where changes have been made to accommodate the NAS, the regulatory mechanisms intended to protect the rights of parties have remained largely unaltered. What the practical outcomes of the NAS policy will be in terms of improving access to training and of improving the skills of the workforce is a matter which probably will take some time to emerge, and such outcomes are, in any case, not discernible by textual analysis of the law and the policy, but will require further empirical research.

This research has examined, in exploring the hypothesis that the law and policy on VET do not provide adequate guidance for people working in VET, the issue of whether the law is transparent, that is, comprehensible and accessible. As far as the issue of transparency is concerned, there is little doubt that like most bodies of law, the legislation relating to VET does not fully meet the ideal of transparency. This is in part due to the scope and quantity of the legislation, which includes laws of general application as well as the law relating to the organisation and administration of VET, as well as to the interpretative, structural and linguistic aspects of the legislation. As far as the publication of policy developments is concerned, the issue of transparency is much less of a problem, provided that there is adequate dissemination of new policy developments to those involved in the administration and provision of VET, although the researchers noted that there is a tendency to develop acronyms which seem to have a relatively short 'shelf-life'. However, this problem may not be a grave issue for administrators and practitioners who work within the regulatory framework, if they have access to administrative guidance as to the practical implications of that framework for their work, and are appropriately informed about policy developments. Further, it may be ameliorated for other users of the VET system and for the general public by the provision of appropriate publicity and informational materials relating both to the policy developments and to the rights and responsibilities of those who seek to undertake vocational education and training. However, the effectiveness of the dissemination of information about VET law and policy was not an issue which could be explored by this research, although it would certainly be a useful future research study.

As far as the link between the legislative framework of VET and changing labour market conditions is concerned, it may be noted that the underlying theme of the development of the law and policy relating to VET in Australia during the twentieth century has been the need to develop the national economy. It is fair to say that the main thrust, but certainly not the only one, of the policies underpinning the legislative regulation of VET and its relationship with changing labour market conditions has been to emphasize educational policies concerned with making the provision of VET responsive to labour market conditions. Perhaps it does not put the matter too highly to say that the regulation of the provision of VET has generally reasonably effectively supported policy implementation over the long term. Of course, what this research cannot do, and does not purport to have done, is to measure the labour market outcomes of the policies and the regulatory framework of VET. That is a task for historians on the one hand and for economists on the other.



# Endnotes

1 See Chapter Two, Historical overview, pp.32–36; see also: House of Representatives, *Social Security Legislation (Youth Allowance) Bill 1997: Explanatory Memorandum*, pp.2–3.

2 See Chapter Four, A survey of policy relating to vocational education and training, 1992–1998, *passim*.

3 See Chapter One, Introduction, pp.1–2.

4 See Chapter Five, A survey of the legal regulation of vocational education and training, pp.132–133.

5 See, for example, Painter, M 1995, *The Council of Australian Governments and intergovernmental co-operation*, Federalism Research Centre, ANU, p.12; Ryan, R & Hardcastle, L 1996, 'Technical and Further Education' in Parkin, A (ed.), *South Australia, Federalism and Public Policy*, Federalism Research Centre, ANU, pp.244–248.

6 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.2.1 The objects of the State and Territory legislation, pp.141–142.

7 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.1 The Commonwealth legislation: the *Australian National Training Authority Act 1992* and the *Vocational Education and Training Funding Act 1992*, pp.138–142.

8 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.2.4 The State Training Agencies, pp.145–147.

9 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.2.2 The Constitution of the State and Territory Training Authorities, p.142, 2.2.3 The powers and functions of the State Training Authorities, pp.142–144.

10 *Loc. cit.*

11 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.2.4 The State Training Agencies, pp.144–146.

12 See Chapter Five, A survey of the legal regulation of vocational education and training, 3. The regulation of the public providers of TAFE, pp.147–158.

13 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.118–120.

14 See Chapter Five, A survey of the legal regulation of vocational education and training, 4.1 Statutory bodies dealing with the accreditation of courses and the registration of providers, pp.159–160.

15 See Chapter Five, A survey of the legal regulation of vocational education and training, 4.1 Statutory bodies dealing with the accreditation of courses and the registration of providers, commentary on Victoria, pp.158–160.

16 (Qld) Vocational Education and Training Bill 1997 ss Pt 2, 6–20 (registration of training organisations), Pt 3, ss 21–26 (accreditation of courses).

17 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.1 The Commonwealth legislation: the *Australian National Training Authority Act 1992* and the *Vocational Education and Training Funding Act 1992*, pp.138–141.

18 See Chapter Five, A survey of the legal regulation of vocational education and training, 2.2.1 The objects of the State and Territory legislation, 2.2.2 The Constitution of the State and Territory Training Authorities, pp.140–142, and 4.2 Statutory Advisory Bodies, pp.160–162.

19 See Chapter Five, A survey of the legal regulation of vocational education and training, 4.2 Statutory Advisory Bodies, pp.160–162.

20 See Chapter Two, Historical overview, p.31.

21 *Ibid.*, pp.30–36.

22 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.120–121.

23 See Chapter Five, A survey of the legal regulation of vocational education and training, 5.3 Towards the New Apprenticeships: The State and Territory legislation, pp.171–175.

24 (Qld) Vocational Education and Training Bill 1997 ss 34–63 (training contracts).

25 *Ibid.* ss 43–46 (supervising registered training organisations).

26 See Chapter Five, A survey of the legal regulation of vocational education and training, 5.3.2 The legislative regulation of apprenticeships, pp.168–177.

27 (Qld) Vocational Education and Training Bill 1997 s 47 (employer to arrange for registration), s 48 (employer to provide facilities), s 49 (employer to report certain notifiable events in relation to changes in a training contract), s 50 (employer to notify completion of training when competencies in employer based training are achieved).

28 Ibid. s 51 (statutory assignment), s 52 (cancellation during probationary term), s 53 (reinstatement in old job if a person a probationer under s 52, or employed by employer prior to entering contract), s 54 (cancellation by mutual consent), s 55 (cancellation on prescribed grounds by chief executive or approved administering body), s 56 (immediate cancellation by employer on grounds of misconduct of person under training), and s 61 further requirements for amending and assigning a training contract).

29 *Ibid.* s 154 (chief executive may appoint inspectors), s 155 (inspector's identity card), s 156 (identity card must be produced), 157 (powers of inspectors), s 158 (conditions of appointment of inspectors), s 159 (inspector's power to enter certain premises), s 160 (procedures where consent for entry is sought), ss 161–162 (warrants), s 163 (general powers after entering places), s 164 (power to seize evidence), s 165 (receipts), s 166 (return of seized things), s 167 (power to require name and address), s 168 (power to require production of documents), s 169 (power to call police for help), s 170 (offence to make false or misleading statements),s 171 (offence to provide false or misleading documents), s 172 (no obstruction of inspectors) and s 173 (no impersonation of inspectors).

30 *Ibid.* s 58 (completion before end of nominal term) s 59 (delayed completion), s 60 (supervising registered training organisation must issue qualification), s 63 (disputes about progress during training).

31 See Chapter Five, A survey of the legal regulation of vocational education and training, 5.4 Apprenticeship legislation and State Industrial Law, pp.177–180.



32 See Chapter Five, A survey of the legal regulation of vocational education and training, 5.3.2 The legislative regulation of apprenticeship, pp.171–173, 176–178.

33 For the grievance provisions in the (Qld) Vocational Education and Training Bill 1997 s 79 (reviewable decisions), ss 80–83 (appointment of reviewers by Minister, duration, conditions of appointment and removal from office), ss 84–88 (function, establishment and composition of review panels), s 89 (procedures to apply for review), s 90 (parties to review), s 91 (stay of action in certain reviewable decisions), ss 92–93 (restriction on reviews of certain decisions and on orders which can be made), s 94 (orders in all other reviews), s 95 (additional powers relating to review of cancellation of training contract), s 96 (procedure for review panel), s 97 (review panel may ask for reports), s 98 (must be a conciliation conference before review is commenced), s 99 (review panel to decide venue), s 100 (alternative ways of attending conference or review), s 101 (review open to public unless review panel decides otherwise), s 102 (right of party to appear and be represented), s 103 (review panel to give notice of decision as soon as possible), s 104 (procedural powers of review panel), s 105 (power of inspection of document), s 106 (offences for failing to attend or give evidence as review panel requires), s 107 (protection of the right against self-incrimination), s 108 (offence to

provide false or misleading information), s 109 (offence to provide false or misleading documents), s 110 (offence of contempt of review panel).

34 See Chapter Five, A survey of the legal regulation of vocational education and training, 6 Vocational placement regulation, pp.180–184.

35 See Chapter Five, A survey of the legal regulation of vocational education and training, 7 Competition legislation and VET, pp.180–186.

36 See Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.121–122.

37 See *Consultation Draft: Vocational Education and Training Bill 1997 and TAFE Institutes Bill 1997*, Department of Industrial Relations, Queensland, 1997, Summary of the TAFE Institutes Bill 1997, np.

38 See (Qld) Draft TAFE Institutes Bill 1997 s 7 (establishment of boards), s 8 (functions of boards), s 9 (boards subject to Minister's directions), ss 10–13 (provisions relating to the appointment of members), and ss 14–20 (procedures and reports). Other provisions in the Bill relate to the appointment of the Managing Director who is responsible for the development of the TAFE institutes' corporate plan, and the usual miscellaneous provisions relating to protection from liability, confidentiality, trespass and so on.

39 See Selby Smith, C & Selby Smith J 1997, 'Third party access and separation of roles in the implementation of user choice,' a paper presented at the National Centre for Vocational Education Research Conference, Melbourne, July, 1997, Table 1, *Public Sector Financial and Management Reforms: Current Status in States and Territories (March 1997)*, pp.21–23.

40 See Chapter Five, A survey of the legal regulation of vocational education and training, 8 Legislation supporting access and equity, pp.186–189.

41 See Chapter Two, Historical overview, pp.40–43 and Chapter Four, A survey of the policy relating to vocational education and training, 1992–1998, pp.115–117.

42 See Chapter Two, Historical overview, pp.24–29.

43 See Chapter Two, Historical overview, pp.40–44.

# Conclusion

THIS PROJECT BEGAN with the broad objective of assembling, classifying and examining the role of law in the regulation of vocational education and training. The reason why such a project was embarked upon has been explained at various points in the report.[1]

At the outset it was understood that the research project would be a difficult and cumbersome task, and that we could expect to achieve only carefully delineated objectives. Preliminary searches leading up to the preparation of the research proposal revealed at least 64 major pieces of legislation at both federal and State levels dealing with VET. To these it would have been necessary to add important statutory provisions extant in the two Australian Territories.

With the size of the task apparent, it was decided that the project would necessarily be restricted to attainable goals, and that these should, appropriately, be those of greatest importance to filling the perceived gap in legal knowledge. Thus the central objective, of particular importance to all scholars, policy makers and institutions and individuals involved or interested in the VET area, was to discover and classify the body of legislation applying in the field. This has been done, principally in Chapter Five of the report. As that chapter makes clear, VET legislation, for the purposes of this project, falls into three major categories according to its essential aims and purposes. These categories are (i) legislation providing a statutory framework for the development of a National Training Policy; (ii) legislation providing for the regulation of the public providers of TAFE and statutory bodies associated with the registration and accreditation of providers, and advisory statutory bodies in this process; and (iii) legislation regulating apprenticeships and traineeships.[2] These categories do not, of course, represent all of the legislation operating in the field of VET, and the report deals widely with other sets of laws which impinge upon VET by design[3] (for example labour relations law specifically aimed at apprenticeships and other aspects of the training agenda) or by virtue of general operation (for example anti-discrimination and competition laws).[4] Nevertheless the classification, and the

sets of statutes brought within it, do, in the view of the authors of this report, contain the foundations from which research into the legal regulation of VET should commence, assuming the inquiry is fundamentally about the role of government in formulating and giving legal effect to a policy on vocational education and training. In short this report first and foremost is about the legislation setting out the objectives of the state in VET, the institutions bearing the responsibility of pursuing those objectives, and the processes and procedures of pursuing them.

In addition to this rather formalistic objective, the project also set about an examination of this body of legislation. In particular the project was concerned to explore, in such depth as time and resources permitted, two important issues. The first of these arose from the gap in legal knowledge which led to the study in the first place. That was to discover the extent to which VET law was associated, historically and contemporarily, with objectives which were primarily labour market in orientation. In this way it was hoped to begin to open up an area of relevance to labour lawyers—legal measures affecting supply and demand in the labour market—which has by tradition been beyond the subject, but which, in recent times, has begun to engage its attention.[5]

The second important issue was to discover whether, and if so to what degree, the development of policy, and hence legislation in, VET had occurred in a reasonably coherent, consistent and systematic fashion, bearing in mind the problems associated with rapidly changing economic and labour market conditions, and with the complex governmental and political structure of federal Australia.

Our responses to these two areas of interest are set out primarily in Chapter Six of this report, Vocational education and training law and policy: An examination. On the first of the two issues raised above the report affirms that, at one level at least, VET may be viewed primarily as an instrument of labour market policy and adjustment, and that that is especially so of the period since the early 1970s. However, this conclusion does not discountenance the relevance of other policy fields such as education or social security in the formation of VET legislation. Whilst the objectives of VET legislation might be primarily set in labour market terms, it has been the education and training systems which have borne the responsibility for giving effect to the task at hand. In other words, the thrust of policy has been to make the education and training system better adapted to the demands of the labour market, rather than on making the major labour market participants (industry, employment groups and agencies) more responsible from within.[6]



Inevitably this interaction or overlap of policy areas gives rise to tensions, and, as Freedland has pointed out, there may be real dangers which arise in the field of employment law (for example) when objectives or ideas with which it is concerned are set primarily from within a different area of policy discourse (such

as education).[7] From time to time these tensions do surface in Australia. Throughout this century the integration of practical and theoretical training for employment has always guaranteed a role for technical education embodying the spirit of contemporary education policy in the relevant fields. However, progressively over the past decade policies have been put in place to develop employment-related skills which, upon one view, challenge the traditional role of educators in vocational education and training.[8] The implications of these developments for the future regulation of the provision of VET remains unclear.

Tension between the employment and education areas is not the only example of existing or potential policy conflict in Australian VET law. A further source of conflict arises from *within* the labour market domain between the concerns of vocational education and training policy and industrial relations policy. These problems have been addressed by some authors,[9] but require further analysis. For example, the *Workplace Relations Act 1996* (Cwth) has made further attempts to redefine the nature of the link between the regulation of vocational education and training and the regulation of terms and conditions of employment through industrial awards and agreements. This reflects a developing concern of governments over the past decade with the relationship between the two policy areas.[10] This report has been useful in at least indicating some points of juncture between labour law, industrial relations and VET law, but a complete examination has been beyond its scope. It represents an important area for future research.

Turning to the second important issue raised above, Chapter Six also reaches certain conclusions about the coherence and consistency of VET law as a means of giving effect to government policy (federal, State and Territory) in this area. Generally speaking again, it was found that apart from a few areas of concern, the legislative framework was reasonably coherent, consistent and gave adequate effect to VET policy. The legislation in the VET area does not appear to be any less coherent or transparent than some other areas of law generally; in fact it might be more comprehensible than other areas we could nominate. The legislation appears to give as good an effect to the National Scheme as is possible given the federal/State government divide in Australia. Where areas of inconsistency or incompleteness arise, these are often due to time lag. It is true, of course, that in some States a different policy might apply on some aspects of the National Scheme, but this does not appear to upset the overall coherence and consistency of the scheme, which, in practice, appears likely to operate in a fairly unified way despite technical gaps and inconsistencies in the legislation. Chapter Six points to other minor problems—inconsistencies in the legislation regulating the public providers of TAFE, incompleteness and inconsistency on the provision for the role of industry in the VET scheme, inconsistencies in relation to the NAS and so on. Again, none of this appears as a major barrier in the overall coherence, consistency and completeness of the legislative scheme for VET, and the chapter concluded accordingly.

One major issue which arises from this research project concerns the *nature* of VET legislation and policy. VET policy is given effect only in part through legislation. Generally speaking the legislation is responsible for the establishment and regulation of institutions, standards, procedures etc. which support the VET structure. It is that legislation that this report focusses upon.

*Giving effect* to these policies, however, through the exercise of Ministerial discretion, and the discretionary allocation of resources, and putting in place the minutiae of policy implementation is a matter for the exercise of *executive power*.

Again, whilst this is an area which it has not been possible to explore in detail in this report, the consequences which flow from this situation are important. First, choices which are made in concordance with a national VET policy may vary according to concerns which are *internal* to States and Territories. Accounting for, and understanding, these particular differences requires further empirical investigation of the practices of those invested with executive powers to implement VET policy within the several States and Territories, a task not able to be carried out in this project. Secondly, from a less focussed standpoint, the issue of policy implementation through executive power gives rise to many important questions about the nature of law and the analytical and research methods which apply to it. Generally speaking the statues examined in this report do not create 'rights' as such, nor do they give rise to significant bodies of case law. Rather, the measures giving effect to rights and expectations under the various VET schemes are carried out by and large as administrative measures within government departments. These schemes are not required to take the form of a statutory instrument, and therefore are not open to parliamentary scrutiny. What we may draw from that is the fact that areas of importance to labour law may go unexamined not only because they are seen as tangential to the subject matter (as VET law might be perceived to be) but also because of the fact that the *form* of the regulation is different from that usually under examination in legal discourse. As Davies and Freedland have amply demonstrated in their discussions of 'leaflet law', there are reasons to suppose that many of these types of administratively implemented schemes are more important than other 'conventional' or 'traditional' areas of the labour law subject matter.[11] Again, we contend that this is a pressing concern for future research.



Finally, there is a body of research work carried out in Europe which presents some interesting ways of examining and evaluating law as an instrument of policy.[12] This research, which seeks to classify law according to objectives, policy instruments and legal measures, may be used as a way of understanding more closely the link between policies and the types of legal measures used to implement them. This enables research to be carried out on a comparative basis, and employed as a means of evaluating the relative success of types of legal measure in implementing policies, amongst other research uses. The regulation of the VET area suggests itself as a field admirably suited to this approach, and thus as an area for further research in regulatory theory.

# Endnotes

1 See, for example, Chapter One, Introduction, pp.1–3.

2 See Chapter Five, A survey of the legal regulation of vocational education and training, *passim*.

3 *Ibid.*, pp.162–167.

4 See Chapter One, Introduction, pp.6–8.

5 For example, Davies, P & Freedland, M 1984, *Labour law: Text and materials*, Weidenfield and Nicolson, London; Mitchell, R (ed.) 1995, *Redefining labour law: New perspectives on the future of teaching and research*, Occasional Monograph No. 5, Centre for Employment and Labour Relations Law, The University of Melbourne.

6 This point has been made of policy development on VET in the European Community, see Freedland, M. 'Vocational training in E C law and policy: Education, employment or welfare?' (1996) 25 *Industrial Law Journal* 110 at p.117.

7 *Ibid.*, pp.117–119.

8 See Chapter Four, A survey of policy relating to vocational education and training, 1992–1998, pp.118–120.

9 For example, Carnegie, J 1996, 'Industrial relations and vocational education and training in Australia' in Selby Smith, C & Ferrier, F (eds), *The economic impact of vocational education and training*, AGPS, Canberra, pp.239–253.

10 See Chapter Five, A survey of the legal regulation of vocational education and training, pp.164–166.

11 See Davies, P & Freedland, M 1984, *Labour law: Text and materials*, Weiderfeld and Nicolson, London, pp.27; Freedland, M, 'Leaflet law: The temporary short-time working compensation scheme' (1980) 9 *Industrial Law Journal* pp.254–258; Freedland, M, 'Labour law and leaflet law: The Youth Training Scheme of 1983' (1983) 12 *Industrial Law Journal* pp.220–235.

12 See Teubner, G (ed.) 1987, *Juridification of social spheres: A comparative analysis in the areas of labor, corporate, antitrust and social welfare law*, Walter de Gruyter, Berlin/New York; Daintith, T (ed.) 1988, *Law as an instrument of economic policy: Comparative and critical approaches*, Walter de Gruyter, Berlin/New York.

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